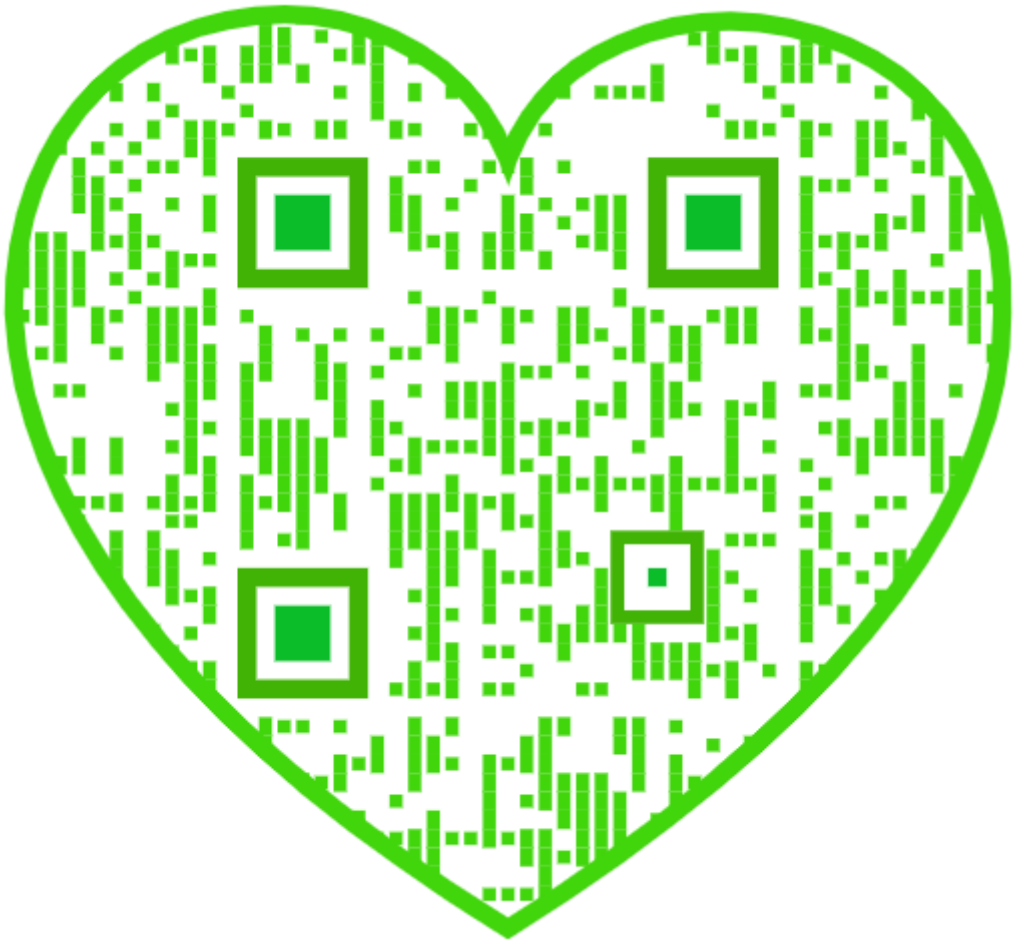

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COMMERCIAL AND BANKING LAW

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Prepared for the American Institute of Banking

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BOOK I

COMMERCIAL LAW

CHAPTER I

Contracts—Mutual Assent

COMMERCIAL LAW is a general term used to cover kinds of law that occur most often in commercial transactions. It is a term of no exact boundary, but most commercial law is based in one way or another on the law of contracts, which is one of the largest subjects in the law. Bills and notes, for instance, are special forms of contracts. In order to understand business law at all, therefore, it is necessary at the outset to have some knowledge of the fundamental principles of the law of contracts.

2. DEFINITION OF CONTRACTS.—What is a contract? Simply a promise or set of promises which the law enforces as binding. Any promise, if it is binding, is a contract or part of a contract. So the law of contracts in their formation resolves itself into this: What promises are binding? A man may make all sorts of promises, but when has he a right legally to say "I have changed my mind, I am not going to do what I said I was," and when will he be liable in damages if he fails to do as he agreed?

3. CONTRACTS UNDER SEAL AND SIMPLE CONTRACTS.—There are two ways of making promises binding, and unless the promisor fulfils the requisites of one or the other of these two ways his promise will not be binding. The first of these ways relates to the form in which the promise is made; the second relates to the substance of the transaction, irrespective of the form. The way to make a promise binding by virtue of its form is to put it in writing and attach a seal to the writing. It is often thought that written promises are binding in any event, or that a promise that is not written is not binding in any event. Neither of these propositions, however, is true. A promise is not binding merely because it is in writing; it is necessary that something more shall be done. Not only must it be written, but a seal must be attached, in order to make the promise binding by virtue of its form. Every one is familiar with the common ending in written contracts—"witness my hand and seal," that is, my signature and seal.

4. WHAT IS A SEAL?—A seal may be—and was originally—made with sealing wax stamped with a crest, initial or what not. This is still a sufficient seal, but the common kind of seal is simply a wafer attached by mucilage to the writing. Another kind of seal, in use by corporations and notaries especially, consists simply in an impression made on the paper without attaching any foreign substance whatever. Any of these methods of seal-

ing a promise are good. In most States a written scroll or scrawl may also be a seal if so intended. It may seem a ridiculous formality for the law to attach importance to this lapping a wafer and attaching it to the end of a writing. In a way it is ridiculous, but it is desirable to have some method by which a promise may be made binding. One method, as an original question, may be as good as another so long as it is an easy method, and attaching a seal is an easy method, and one which makes it possible to make a promise binding whenever you wish.

5. CHANGE BY STATUTE OF THE LAW AS TO SEALED CONTRACTS.—There has been in this country a certain hostility to the law of sealed instruments. It has been thought, with reason, that some of the rules governing contracts under seal have by their technicality promoted injustice. This has certainly been true of an old rule that contracts under seal could not be altered or discharged by any agreement not itself under seal. The rule, however, that a seal avoids the necessity of consideration is a desirable rule, since it is important to have some means by which those who so intend may make gratuitous promises binding. It would be better then by statute to abolish undesirable incidents of sealed contracts rather than to destroy totally the legal effect of a seal. However, in many States the distinction between sealed and unsealed contracts is totally abolished. Such States

are Arizona, California, Idaho, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee and Texas. In most of these States it is further enacted that any written contract shall be presumed to have been made for sufficient consideration, but if lack of consideration is affirmatively proved, the contract is invalid. In other States it is enacted only that sealed contracts shall be presumed to have been made for sufficient consideration; but in these States—Alabama, Michigan, New York, Oregon and Wisconsin—as in those previously named, lack of consideration could be affirmatively proved. In the States last named, however, unsealed written contracts remain as at common law, that is the burden of proving consideration rests upon the plaintiff who seeks to enforce such a contract.

6. REQUISITES OF SIMPLE CONTRACTS. —Sealed contracts are comparatively easy to understand. Simple contracts, which are promises made binding by virtue of their substance rather than their form, though called simple, are more difficult to understand, and more complex. They are also much more common than sealed contracts. A simple contract is a promise, or promises, to which the parties have assented, and for which a price called consideration has been paid. One may promise as much as he wishes orally or in writing so long as he does not attach a seal to his signature and then say

he does not care to keep his promise, unless he has both been paid for the promise and there has been an assent by the promisor and promisee to the terms of the transaction. Mutual assent and consideration are then the requisites of simple contracts.

7. OFFER AND ACCEPTANCE IN UNILATERAL AND BILATERAL CONTRACTS.—The way that mutual assent is manifested is by an offer and an acceptance of the offer. Two persons are not likely to express at the identical minute the same proposition. It is as a practical matter, then, essential that one should make a proposition, and if a contract is to be made, that the other should assent to it. An offer may be made to one or more specified persons, or to any one whomsoever who will do what the offer requests, as in case of an offer of a reward. An offer is itself a promise, but is a promise conditional on the payment of a consideration or return for it either by some act or some promise from the other party. According as the offer asks for an act or a promise it will fall into one or the other of two great divisions of simple contracts; one kind is called unilateral (meaning one-sided), that is, a promise only on one side; and the other is called bilateral, a promise on each side.

8. ILLUSTRATIONS.—Let us give illustrations of these contracts. We say to John: "We will promise to give you, John, $100 if you will do a specified piece of work." That is a proposal to make

an exchange of the work for the money in a sense, but more exactly it is an offer to exchange an agreement to give the money in return for the work. We are not saying to John: "If you will agree or promise to do that work we will promise to give you the money." We are saying that we will give you the money if you actually do the work. That offer requires the actual doing of the work before it is binding. Until then the price requested for the promise has not been paid. It is an offer of a unilateral contract. Again, when we say to a man: "If you will spade up our garden we will pay you $2 a day," we are making an offer for a unilateral contract. We are asking him to spade up the garden; not to promise to spade it up, but to do it, and when he does it he can hold us liable on our promise to pay him $2 a day. The promise will have become binding because we have been given the payment that we asked for our promise.

But if we say to a man: "If you will agree to work for us the next month we will pay you $100," and the man says, "All right," then we have a bilateral contract. We are asking him, as the price of our promise, not to work but to agree to work, and he has promised to do so.

To say "I accept" is always sufficient acceptance in the case of a bilateral contract where a promise is requested, but if I said to you, "I will give you $5 if you will bring me a book here," it would not make a contract to say "I accept." I said I would give

you $5 if you brought the book here, and nothing but bringing it here will form a contract. The offeree must always do what the offerer asks him. If an offerer asks for a promise, any form of words indicating assent would be sufficient, because they would mean, in effect, "I consent to make the promise you specify in your offer."

The form of wording in simple contracts is immaterial. Any plain language is sufficient for an offer, and as for acceptance, it does not matter whether the acceptor says "all right," or "I accept your offer," or in what form he expresses his assent. The question is, does he express assent? Now, the offerer is at liberty to name any consideration in his offer that he sees fit. He can name, in other words, whatever price for his promise that he chooses to ask. If the person addressed does not choose to pay that price, all he has to do is to reject the offer, but he can bind the offerer only on the terms proposed. Therefore, if the offerer asks for an act in return for his promise, that is, asks for an immediate payment, or work, or the giving of property for his promise, no contract can be made by the person addressed saying "All right, I will do it;" that is not giving the price the offerer asked. On the other hand, should the offerer ask for a promise and not for an act, the acceptor must be given the promise he asks for.

9. OPTION WITHOUT CONSIDERATION. —A common business transaction that presents

very well the principles governing the formation of simple contracts is what is called an option. Suppose the owner of a mine says: "I will sell you this mine for $50,000, and you may have thirty days to decide whether you choose to accept the offer or not." Now, it does not matter whether that statement is oral or in writing; it is merely an offer, and not binding as the matter stands as far as we have stated. However, if it were in writing and a seal attached (in a State where seals still have the force which the common law gave them) it would be a binding promise to sell the mine at that price at any time within thirty days. If there is no seal attached, as long as the offer is unaccepted and unpaid for, it is not binding. The man who makes it may say: "I withdraw my offer. It is true that I promised to keep the offer open thirty days, but you did not pay me for that promise and I am going to break the promise. I withdraw my offer." Any offer for the formation of a simple contract, while unaccepted, may be withdrawn. But, if before it was withdrawn and within the thirty days' limit, the person to whom the option was given said, "Here is the $50,000 which you said you would take for your mine," the offerer would then be bound, and would have to perform his part of the contract.

10. OPTION WITH CONSIDERATION.—Let us change the character of the option a little. Suppose in consideration of $1,000 paid down the owner of a mine promises to sell the mine for

$50,000 at any time within thirty days. Here the offer, or the contract, for it is now more than an offer, has been paid for, and it is therefore binding. The person to whom the offer was made paid $1,000 for the promise, therefore the promisor is bound to keep it. It was not an absolute promise to give the mine to the buyer, but it was a promise to sell it to him for $50,000 if he chose to take it within thirty days; that is a conditional promise. A conditional promise may be binding and paid for just as well as an absolute promise.

11. INSURANCE POLICY.—Take the case of a fire insurance policy. That is a conditional promise, a promise to pay indemnity for the destruction of a house by fire. Therefore, the performance of the insurance company's promise is conditional on the suffering by the insured of loss by fire. An insurance policy is ordinarily a unilateral contract; the premium is the consideration or price paid for the promise, and the promise is binding on the insurance company from the time when the premium is thus paid. Of course, the promise is only binding according to its terms. The insured has bought a conditional promise, a promise to pay if the house burns down. He gets that promise, but he will not become entitled to any money or any damages unless the house burns down nor unless he complies with the other conditions of his policy.

12. GUARANTEE.—Another kind of promise worth referring to is a guarantee. A question arises

whether a business house will sell something to a buyer on credit, and it decides it will not without a guarantee. Accordingly, John agrees that if the house will sell James a bill of goods, John will guarantee the payment of the price. That means, if James does not pay for the goods, John will. That is a unilateral contract in which the promise is conditional, and the consideration for that promise is the selling of goods to James.

13. PRELIMINARY NEGOTIATIONS. ADVERTISEMENTS.—An offer is sometimes difficult to distinguish from other things. Suppose the case of an advertisement. A business house advertises that it will sell goods for a certain price. Take the case of a bond list issued by a banking house. The list states that the house will sell specified kinds of bonds at quoted prices. John receives one of those lists, looks it over, sees something that looks good to him, and goes into the banking house and says, "I will take five of those bonds at the price named here." The banking house says, "We have sold all the bonds of that kind that we had;" or it says, "The market has changed on those bonds and there has been some advance in the price." Has John a cause of action against the banking house? He has if that bond list amounts to an offer,—that is, if the list means that the banking house offers to enter into a contract with any one receiving the list. But it has been held that that sort of advertisement does not prima facie amount to an offer,

although it might be put in such clear words of agreement to sell on the part of the banking house that they would amount to an offer. Generally an advertisement of this sort, or anything that can fairly be called an advertisement of goods for sale, is held to mean simply that the advertiser has these goods for sale and names a price he is putting upon them; he invites customers to come in and deal with him in regard to them. It is an invitation to come and make a trade rather than a direct offer of a trade.

14. ORAL AGREEMENT PRELIMINARY TO WRITTEN CONTRACT.—Another case of the same nature that comes up not infrequently is this: Parties talk over a business arrangement and then they say, "As this is a pretty important matter let us put it down in writing, let us have a written contract containing what has been agreed upon." When it comes to drawing up the contract, however, they cannot agree. One party then says, "Well we made a definite oral agreement any way; let us carry that out." The other replies, "Why, no, all that was dependent on our making a written agreement." The settlement of their dispute depends on how definite and absolute the oral agreement was. It is possible to make an oral agreement binding, although the parties do agree and do contemplate that it shall subsequently be reduced to writing, but generally the inference is that the oral agreement was merely a preliminary chaffering to fix the terms of the writ-

ing, and that everything is tentative until the writing is made and signed.

15. AUCTION SALES.—Another state of affairs involving preliminary invitations is presented by auction sales. The auctioneer puts goods up for sale, a bid is made, the auctioneer gets no other bid, and then says, "I will withdraw this from sale." Is the auctioneer liable? Has he made a contract to sell that article to the highest bidder? When the transaction is analyzed, is this what the auctioneer says in effect: "I offer to sell these goods to the highest bidder?" If this is the correct interpretation, then when the highest bidder says, in effect, "I agree to buy them," there would be a contract. On the other hand, if what the auctioneer says is in effect like what the advertiser says: "Here are some goods for sale, what do you bid, gentlemen," then the auctioneer is not making an offer himself. He is inviting offers from the people before him, and until he accepts one of those offers from the bidders before him there would be no contract; and until then the auctioneer could withdraw the goods. And that is the construction put upon the auction sale,—that the auctioneer is not making an offer, but is simply inviting offers. Even if the auctioneer promises that he will accept the highest offer, that is, that he will sell to the highest bidder, his promise to accept the highest bid, not being paid for, would not be binding upon him were it not for a statute in some States which, in the sale of goods, would make

an auctioneer bound to keep a promise to sell without reserve, that is, to the highest bidder, if he made such a promise.

16. BIDS OR TENDERS.—Somewhat similar to the case of the auctioneer is the case of tenders or bids for the construction of buildings, or for the sale of goods to a city or to a corporation. There, too, the corporation or the city is simply inviting offers. They do not say, "We offer to enter into a contract with any one who makes the lowest bid," but, rather, "We are thinking of entering into a contract, and we want to receive offers in regard to it." When the offers are made by the bids or tenders, any or none of them may be accepted, according as the receiver thinks best. It is sometimes required by law that public corporations, like cities or counties, shall accept the bid of the lowest responsible bidder, but aside from such statutes, any or none of the bids may be accepted.

17. IMPLIED CONTRACTS.—An offer and acceptance are ordinarily made by words either spoken or written; but any method of communication which would convey to a reasonable man a clear meaning will serve as well as words. If A goes to his grocer and says "send me a barrel of flour," he has in terms made no promise to pay for the flour, but the natural meaning of his words is that he agrees to pay. In this case A used words, though not words of promise; but the same result might follow where no words at all were used. Suppose A

went into a shop where he was known, picked up an article from the counter, held it up so the proprietor could see what he was taking, and went out; this would be in legal effect a promise by A to pay for the goods. A contract where the promises of the parties are to be inferred not from express words of promise but from conduct or from language not in terms promissory, is called an implied promise or contract, as distinct from an express promise or contract, that is one where the undertaking is in express language. This difference between express and implied contracts relates merely to the mode of proving them. There is the same element of mutual assent in both cases, and the legal effect of the two kinds of obligations is identical. There is, however, another kind of obligation which is frequently called an implied contract, but sometimes called a quasi-contract, because it is not really a contract at all, though the obligation imposed is similar. If a husband fails to support his wife, for instance, she may bind him by purchases of goods necessary for her support. She may do this even though he directly forbids the sales to her. There is obviously no mutual assent in this case; the husband emphatically dissents and expresses his dissent, but he is bound just as if he had contracted.

18. TERMINATION OF OFFER BY REVOCATION OR REJECTION.—Since offers do not become binding until accepted according to their terms, up to that time they may be terminated with-

out liability. This may happen in several ways. In the first place an offer may be revoked by the offerer. To effect a revocation he must actually notify the other party of his change of mind, before the latter has accepted. We have already stated that offers may be rejected by the person to whom they are made. For instance, we say, "We offer you one hundred shares of stock at a certain price, and you may have a week to think it over." You say "I do not care for that offer, I reject it." You come around the next day and say, "On reflection I have concluded to accept that offer." The acceptance is within the seven days which we originally said might be used for reflection, but the offer has been terminated by the rejection. There is no longer any offer open, and consequently the acceptance amounts to nothing. A troublesome question in regard to the revocation of an offer for a unilateral contract is this: Suppose A offered B $5 for a book and B ~~went~~ went up and ~~got~~ went to the door, then A refused to take the book.

The general disposition is to try to hold that promise binding, and yet the difficulty is that the offeree has not fully done what he was asked to do, and if he chose to turn back and take the book away he could do so without liability. He could say, "I did not promise to bring the book. I brought it part way, the walk was long and I am going to take it back." If he is thus free to withdraw it seems impossible to deny that the other party is equally free.

Bilateral contracts are more desirable than unilateral because in bilateral contracts the mutual promises bind the parties before they begin to perform and both parties are therefore protected while they are performing. In unilateral contracts, the contract is not completed until the act requested is fully done. Until then, therefore, either party may withdraw.

19. A COUNTER OFFER IS A REJECTION. —Another way in which offers may be terminated is by a counter offer on the part of the person to whom the offer was made. We say, "We will sell you stock for $100 a share, and you may have a week to think it over." You say, "I will give you $99 a share." We say, "No, we will not take it." You say, "Well, I will give you $100." You are too late; you rejected our offer of sale at $100 by saying you would give us $99. The minute you say you will give us $99, our offer is rejected. Of course, when you make the counter offer of $99, if we say we will accept your offer to buy, that would make a contract. Offers are constantly rejected by counter offers by people who really intend to enter into a contract. Suppose A says, "I will lease you my house a year for $800." You say, "All right, I will take it if you paper the dining room." That rejects the offer. A new offer has been made by the person addressed, who offers, if the dining room is papered, to take the house at $800.

20. TERMINATION OF OFFER BY DEATH

OR INSANITY.—An offer is also terminated by the death or insanity of either party before acceptance. After a contract has once been formed neither subsequent death nor insanity terminates liability upon it unless the contract is of such a personal character that only performance by the contractor in person will fulfil it.

21. TERMINATION OF OFFER BY LAPSE OF TIME.—Finally, an offer may be terminated by delay on the part of the person addressed. An answer to an offer must be sent in time, whether mail or telegraph is used, or whether the parties are dealing face to face. An offer lapses if it is not accepted within the time the offer specifies if any time is specified. If no time is specified, then within a reasonable time. One may specify any length of time in his offer, and it will remain open for that time provided it is not rejected or revoked, and neither party dies or becomes insane, in the mean time. But frequently offers contain no express limit of time; then it is a question of what is a reasonable time, and reasonableness depends upon business customs, the character of the transaction, the way the offer is communicated and similar circumstances. An offer on the floor of a stock exchange will not last very long. A reasonable time for acceptance of such an offer is immediately, and an offer sent by telegraph will not remain in force long. The use of the telegraph indicates that the offerer deems haste of importance. An offer sent by mail will last longer.

An offer relating to things which change in value rapidly will not remain open for so long a time as an offer which relates to land, or something that does not change in value rapidly.

22. BOTH PARTIES MUST BE BOUND OR NEITHER.—Both parties to a simple contract must in effect be bound, and until they are, there is no contract. In a unilateral contract, before the promise becomes binding, the promisee must have actually performed what he was requested to do, that is, he must bind himself by actual performance before the offerer's promise is binding on him. In a bilateral contract, where each party makes a promise, neither promise can be binding unless and until the other one is. So that in the case of the proposed agreement to lease, as the proposed tenant might refuse to take the house if the dining room was not papered, the proposed landlord has a similar right; that is, since one is not bound the other is not.

23. CONTRACTS BY CORRESPONDENCE.—Contracts are often made by correspondence, simple contracts especially. That raises rather an important question as to how and when the contract is formed. Suppose a letter containing an offer is addressed from Boston to a man in New York. A reply is sent by him from New York accepting the offer. That reply goes astray. Is there a contract? Yes. It creates a contract by correspondence for a letter to be mailed by the acceptor provided the offerer imposes no conditions to the contrary, and

impliedly authorizes the use of the mails, as he does by himself making an offer by mail. But suppose the offerer in his letter says, "If I hear from you by next Wednesday I shall consider this a contract." Then, unless the offerer receives an answer by the next Wednesday, there will be no contract. It will make no difference that an answer has been mailed, it must have been received, that is a condition of the offer. Suppose an offer is made by word of mouth, and it is accepted by sending a letter. Does the contract then become binding, irrespective of receipt of the letter? No, unless in some way the offerer has authorized the use of the mails in sending such an answer, and if the circumstances were such that the use of the mails would be customary, that would amount to an implied authorization. The use of the telegraph depends upon similar principles. If an offer is sent by telegraph, an answer may be sent by telegraph, and an acceptance started on its way will become binding although it is never received. Similarly, one may authorize a telegraphic answer to a letter containing an offer sent by mail, and if the use of the telegraph is authorized, a contract will arise at the moment that the telegram is sent.

23a. ILLUSTRATIONS.—In the case of an option, if the acceptance was made by mail and lost in the mails, a binding contract would be formed if the use of the mail was expressly or impliedly authorized, and similarly if the option called for payment and a letter was mailed con-

taining a draft or cash. There is a right to send a check or draft by mail if the parties had been dealing by mail. That authority would be implied. When parties are dealing by mail and there is a bargain that a check shall be sent, the check becomes the property of the person to whom it is sent as soon as it is sent, and, therefore, when the letter with the check is put into the mail it operates as a payment on the option, and the loss of the draft is not the sender's loss, but the other man's. A lost draft, however, can be replaced and must be replaced. Authority to send actual cash by mail would not be so easily implied, especially if the amount were large, because it is contrary to good business custom; but if authority were given, the result would be the same as in case of a check. It would, however, be a proper business precaution to register the letter if it contained cash.

If the offerer, not having received the letter of acceptance and thinking none had been sent, sells the property to another person, though not morally blamable, he would get into trouble. The second purchaser would get title to the property, supposing that the property was actually transferred to him. The lost letter created a contract, but it did not actually transfer title to the property, and, therefore, when the purchaser actually got possession of the property he would become the owner of it and could not be deprived of his title if he took it innocently. If, however, the person to whom the property was

transferred had notice of the prior completion of a contract, he could not keep the property. In any event the seller would be liable in damages for breach of the contract completed by mailing the lost letter.

Suppose an option is given by telephone to one who just before the option expires tries to get a connection by phone to accept and is unable to do so, and ten minutes after the time has expired a connection is secured? There is no contract and he has no action. It is no fault of the offerer that the acceptor was unable to accept in time, and, generally speaking, one who wishes to accept an offer must at his peril keep the means of acceptance open.

It may be asked why does not the same principle apply in regard to mail as to the telephone; that is, why does not starting the acceptance by telephone complete the contract? Because there is no authority to send communication by telephone to the offerer when the acceptor has no telephone connection. When one sends an offer by mail the reason that he is bound by an acceptance sent by mail is because he, in effect, asks that an acceptance properly addressed to him be started on its course. He takes his chance as to the rest, but an offerer by telephone does not authorize a reply by talking into the telephone when there is no connection.

24. MISTAKES IN THE USE OF LANGUAGE IN OFFER AND ACCEPTANCE.—Another question which has to do with the express mu-

tual assent of parties relates to the meaning of language used. Suppose an offerer says, "I will sell you a cargo of goods from the ship 'Peerless,' due to arrive from India, at a certain price." The buyer assents. There are two ships named "Peerless," and the buyer thinks one is meant, but the seller thinks the other is meant. Is there a contract for the sale of the cargo of "Peerless" No. 1, or a contract for the sale of the cargo of No. 2, or no contract at all? The answer is, that language bears the meaning which a reasonable person in the position of the person to whom the offer is made is justified in attaching to it. If a reasonable person in his position would think "Peerless" No. 1 was meant, then there is a contract for the cargo of No. 1. If he was not justified in thinking that, and ought to have thought No. 2 was meant, although in fact he did not think so, there was a contract for the cargo of "Peerless" No. 2. If either meaning were as reasonable as the other, then each party has a right to insist on his own meaning, and there would be no contract. This principle often comes up in contracts made by telegraph, where the words of the telegram are, by the mistake of the telegraph company, changed. For instance, a telegram purports to be an offer to sell a large quantity of lathes at $1 a bundle. The terms as actually despatched by the seller in making his offer fixed the price at $1.20. The telegraph company dropped off the words "and twenty cents." A telegram is sent back by the buyer, "I accept your

telegraphic offer." Then trouble arises when buyer and seller compare notes. Well, the offerer is bound. He selected the telegraph as the means of communication, and he must take the consequences of a misunderstanding, which arose from a mistake of the agency which the offerer himself selected. The question may be asked: Would there be any right of action against the telegraph company by the offerer, the sender of the telegram? The answer is yes. The company has broken the contract it impliedly made with the sender to use reasonable diligence in despatching and delivering the message.

But the trouble with that action is that on telegraph blanks there is always this in substance: that on unrepeated telegrams this company is liable for mistakes only to an amount not exceeding twice the cost of the telegram; and it has been held in many States that that limit on unrepeated telegrams is not unreasonable. The sender of the telegram has agreed to the contract on reverse side of the telegraph blank, and he ought to have his message repeated if he desires to hold the company liable in full damages if his message does not reach the party addressed in absolutely correct form. In other States, however, this limitation of liability is held to be against public policy and the company is liable for the full damage suffered.

25. CONDITION IN OFFER REQUIRING RECEIPT OF ACCEPTANCE.—An offerer, as has been said, may insert in his offer any condition

he sees fit. He may therefore insert condition that an acceptance shall reach him, not merely be despatched. The condition may specify the time within which the acceptance must arrive in order to be effectual. It is a wise precaution in all business offers of importance to insert such a condition in the offer. It will not be sufficient to add to the offer such words as "subject to prompt acceptance," for prompt acceptance would be given, within the meaning of the law, by despatching the acceptance, not by the receipt of it. The condition should be in such words as "subject to prompt receipt of your acceptance," or, "subject to receipt of your acceptance" by a stated day or hour.

26. WHEN SILENCE GIVES CONSENT.—There is one way of manifesting mutual assent, namely, by silence, of which a word should be said. There is a proverb that "Silence gives consent." Is it so in law? Suppose a man goes into an insurance broker's and tosses some policies down and says, "Renew those policies, please." Nobody says anything and he leaves the policies there and goes out. The next night his buildings burn down. Are they insured? They are, in effect, if the insurance broker has contracted to renew the policies, otherwise the buildings are not insured. Now on the bare facts, as we have stated them, they are not insured; some other facts must always exist to make silence amount to assent. If for instance on previous occasions, the broker kept silence when such statements

were made to him, and nevertheless carried out the proposal, it is a fair inference that he means by his silence this time what he meant the preceding time. Furthermore, silence, when the offer is unknown, can never amount to assent. In the case as we have put it, we did not say even that the insurance broker heard the offer; if he did, then the question would depend on whether he had ever done anything to justify the other person in believing that silence would mean assent in such a dealing, or whether business customs justified the assumption.

The offerer cannot by his own act make the silence of the other person amount to an acceptance. Suppose an offer of this sort: "We offer to sell you 100 shares of stock at $50 a share, and unless we hear from you to the contrary by next Wednesday we shall conclude that you have accepted our offer." The offerer does not get any word before next Wednesday. Nevertheless, there is no contract. The person addressed has a right to say, "Confound his impudence, I am not going to waste a postage stamp on him, but I don't accept his offer. He has no business to suppose that if he doesn't hear from me to the contrary I assent."

This sort of case is not infrequently referred to: A magazine is sent through the mails on a subscription for a year, the subscription runs out, the magazine is, nevertheless, still sent. Is the person who receives it bound to pay another year's subscription? Here you have a little more than silence; you have

the receiver of the magazine continuing to receive it. If he refused to receive it, undoubtedly there would be no contract, but where a man takes property which is offered to him, he is bound by the proposal which was made to him in regard to the property. He ought to let the magazine alone if he doesn't want to pay for it. You may say that the receiver does not know that the subscription has run out, and if he did he would not take the magazine. But then he ought to know. He made the subscription originally. The difficulty is merely in his own forgetfulness, and he cannot rely on that.

CHAPTER II

Contracts—Consideration

27. CONSIDERATION MAY BE ANOTHER PROMISE OR AN ACT.—The second great requisite in the formation of simple contracts is consideration. A price must be paid for a promise in order to make it binding. The price paid may be another promise, in which case the contract is bilateral, or the price paid may be some act actually done or performed, in which case the contract is unilateral.

28. ADEQUACY OF CONSIDERATION IMMATERIAL.—Not any act, or the promise of any act, is sufficient consideration, as will be seen. Nevertheless, in general the law does not attempt to gauge the adequacy of the consideration; that is, parties may make such bargains as they wish as far as the price is concerned. A may say that he will sell his horse, which is worth $300, for $100, or for a promise to pay $100. That will be a perfectly good contract, if accepted, in spite of the fact that the promised horse is worth more than the promised price. Such difference in the value of the promise and the value of the price may go to a great extreme. The horse may be a thousand-dollar animal, and the price promised only $100, but when you wish to push the case to an extreme you are likely to get into this difficulty: Did the parties really mean to make a bargain? If what they were doing

was arranging for a gift of the horse and putting up some little alleged consideration as a blind, that will not do; but any exchange the parties really in good faith bargain for, with certain exceptions hereafter stated, is sufficient.

29. A SMALLER SUM OF MONEY IS NOT SUFFICIENT CONSIDERATION FOR THE PROMISE SIMULTANEOUSLY TO PAY OR DISCHARGE A LARGER LIQUIDATED SUM. —This is the principal exception, that in contracts or promises relating to a fixed sum of money, the consideration cannot be the simultaneous payment or discharge of a smaller sum of money on the other side. If A promises B $100, it will not be good consideration for B to promise in exchange $50, or even $99.99, payable at the same time and place. In other words, the law does require adequacy in exchanges or agreements to exchange money. This comes up most frequently in this sort of case. A owes B $100 and says to him, "I can't pay it all," or "I don't want to pay it all. Will you let me off for $50?" B replies, "Yes, I will take $50." That agreement is not binding, and even if the $50 is actually paid, B may afterwards come and say, "You paid me only part of the debt you owed me. It is true I said I would call the whole thing square, but there was no consideration sufficient in law for my promise, since you paid me only part of what you were bound to." This rule of the common law though generally well established, does not exist or

is much qualified in a few States, namely: Georgia, Maine, Mississippi, New Hampshire, North Carolina, Virginia.

30. UNLIQUIDATED CLAIMS MAY BE DISCHARGED BY ANY AGREED SUM.—That case must be distinguished from another. Suppose A owes B some money for services, the price of which never was exactly fixed, but which B says are of the value of $100. Then if B agrees to take $50 in satisfaction of his claim against A, B is bound; the transaction is effectual. The difference is between what is called a liquidated and an unliquidated claim.

31. DEFINITION OF LIQUIDATED CLAIM.—A liquidated claim is one of an exact amount definitely fixed. Such a claim, as has been said, cannot be satisfied by partial payment or promise of partial payment. But an unliquidated or a disputed claim—a claim subject to a real bona fide dispute, not merely a dispute trumped up for the purpose of disputing a good claim—may be discharged by any payment on which the parties agree. The law does not know how much the unliquidated claim is worth, and will allow parties to bargain for the sale of the unliquidated claim, just as it will let them bargain for the sale of a horse for which they may fix such a price as they choose, and that price will not be revised.

32. EFFECT OF RELEASES AND RECEIPTS.—If, however, the original claim were

liquidated and undisputed is there any sort of paper the debtor could get from the creditor that would release him absolutely? A receipt in full would not do it; the receipt in full is something to which business men attach more virtue than it possesses. It is merely evidence of an agreement to accept what has been received in full payment. But as we have seen, such an agreement is not valid without consideration, and payment of part of a debt admittedly due is not sufficient consideration. The really effective instrument at common law is the release under seal. That will do the work whether the debtor paid part of the debt or not, since a sealed instrument needs no consideration. In jurisdictions where seals have been deprived of their efficacy at common law an insuperable difficulty, however, exists. In a few States—Alabama, Arkansas, Connecticut, Michigan, New York, North Dakota, South Dakota, Tennessee—a receipt in full has been given the effect which the common law gave to a sealed instrument.

33. OTHER ILLUSTRATIONS.—Suppose the agreement to settle a liquidated claim were oral and suppose a witness heard the words. Such circumstances would not make any difference. It is assumed in all that has been said that the facts are proved. Suppose that neither party denied the facts. Let the creditor admit that he did receive this $50 as a full payment and did give the debtor a receipt in full. Still, he can say, "I propose to

break my agreement since it was not supported by sufficient consideration, and I shall collect the balance."

Another question is this: Suppose a man had a $100 bill and he wanted some change very badly, and another man had $99. Could the former take that for the $100 bill. He could. If a man wants a particular kind of money, as gold, or silver, or quarters, the principles stated do not apply; it only applies to dollars as such and cents as such. Ninety-nine dollars will not serve as consideration for a promise to give $100, but 99 gold dollars, or one-dollar bills, if that form of money is particularly desired, will serve as consideration for a promise to pay $100. Moreover, the question calls attention to another matter which should be made clear. It is only promises which need consideration. Not only can you give a $10 bill for a smaller amount in change, but you can give it for nothing, and if you do so you cannot recover it. In other words, you must distinguish between actually giving $10 on the one hand, and, on the other hand, promising to give $10 or agreeing to give up a claim for $10. The $10 itself may be given for no consideration at all, so long as the money is actually handed over. It is impossible to hand over a promise to give $10 and it is impossible to hand over a claim for $10. All that can be done in such cases is to agree to hand over the $10 or to agree to give up the claim, and it is such agree-

ments which need consideration in order to make them binding.

34. PAYMENT OF PART OF A DEBT BY ONE WHO IS NOT THE DEBTOR.—Suppose a little different case: A owes B $100 for a liquidated claim. A's father says to B, "If you will let my son off, discharge him from this claim, I will pay you $60, not a cent more." B agrees, and the $60 is paid. Now B never can get any more; the bargain is binding; and the reason is, although A was bound to pay the whole $100, and it would have been no good consideration for B's promise to give up the rest for A to pay a part of the $100, A's father was not bound to pay a cent and he may bargain for any exchange in return for a payment which he was not bound to make at all. Therefore, he may bargain that the debt shall be discharged.

35. PERFORMANCE OR PROMISE OF PERFORMANCE OF A LEGAL DUTY IS NOT SUFFICIENT CONSIDERATION.—In other words, the thing which will not be good consideration, whether done or promised, is the performance or partial performance of something which the man who performs or promises is under a legal duty to do anyway. If he ought to do it anyway, then it will not serve as a price for a new promise or agreement to discharge it. Another illustration of that may be given: Suppose a contractor agrees to build a house for $10,000; he gets sick of his job when he is about half through, says that it is not possible for

him to make any money at that price and he is going to quit. Well, the employer says, "If you will keep on I will give you a couple of thousand dollars more." Accordingly the builder keeps on. That won't do. The builder in keeping on building is doing no more than he was previously bound to do. If he wants to get a binding agreement for the extra $2,000 with his employer, he must get a promise under seal, for his own promise of performance will not support the promise to pay.

36. FORBEARANCE AS CONSIDERATION. —Another kind of consideration that is worth calling attention to is forbearance. A has a valid claim against B. He says he is going to sue. B says if he won't sue, or won't sue for the present, B will pay something agreed upon. That is a good contract so long as it is not open to the objection referred to a moment ago; that is, so long as A's claim is not for a liquidated sum of money and B's promise is not merely a promise to pay part of that liquidated sum. A may promise what B requests, either to forbear temporarily or to forbear perpetually. Either will be good. But suppose A has no valid claim against B, but B is reputed to be rather an easy mark in the community and A is a person of little scruple; he accordingly trumps up a claim against B with the hope of getting a compromise. Is forbearance of that claim by A good consideration for B's promise? No. A's claim must be a bona fide one in order to make surrender of it or the forbearance to

press it, either temporarily or permanently, a good consideration for a promise of payment.

37. STATUTE OF LIMITATIONS.—Another case of a promise relating to a subject of very frequent importance in commercial law, and law generally, is a promise to pay a debt barred by the statute of limitations, and this occasion requires a preliminary word in regard to that statute. This statute prohibits the bringing of an action or a claim after the expiration of a certain period. It is a different period for different sorts of claims. Action on a judgment in most States may be begun within twenty years after such judgment is rendered; so in some States may a contract under seal or a witnessed promissory note (that by the way, is the only advantage of having a witness to a promissory note, and frequently is a considerable advantage in regard to a note which is expected to be held for a long time). On the other hand, ordinary contractual claims generally expire in six years. Claims in tort, that is, for injury to person or property, last even a shorter time, but the ordinary contractual statute of limitation is six years. The statute begins to run against a promissory note, or other contract not from the time when it is made, but from the time when it is by its terms to be performed. A note made now, payable the first of January next, will not be barred until six years from the 1st of January, not six years from now; and if it was made payable in ten years,

as a mortgage note might well be, the statute would not bar it for sixteen years.

38. PROMISE TO PAY BARRED DEBT.—It has been held, though the reasons are not very easy to explain, that a new promise will revive a debt so far as the statute of limitations is concerned. There need be no consideration for such a promise other than the existence of the old indebtedness; that is said to be a sufficient consideration, although, of course, it can hardly be said to be given as a price for the new promise. Take a promissory note payable Jan. 1, 1905. If nothing happens, that is barred on Jan. 1, 1911, but if in 1911 or 1912 the maker says, in effect, "I know I owe that old note. I have not paid it, but I will pay it," he will be liable on that new promise, and the statute will begin to run again and run for six years from the making of that new promise. It is not enough that the debtor should admit that there was a liability; he must promise to pay it in order to make himself liable. Suppose, instead of a new promise made after the statute had run in 1911 or 1912, the maker had said before the maturity of the note, we will say in the course of 1910, "Don't worry about that note, I shall pay it," that also will start the statute running afresh. In other words, the new promise may be made before the maturity of the note, or before the statute has completely run as well as after the statute has completely run. In either case the new promise will start a fresh liability and keep it alive

for six years from the time the new promise was made. Of course, if the new promise is made the day after maturity of the old obligation, the total effect will be simply to extend the time of the statute one day, because only one day of the six years had run at the time the new promise was made, and counting six years from the new promise gives only one day more.

39. PART PAYMENT OF BARRED DEBTS. —Not only will a new promise in express terms keep the statute of limitations from barring a claim, but any part payment will have the same effect, unless at the time the part payment is made some qualification is expressly stated. A debtor may say, "I will pay you this part of my debt, but this is all," and incur no further liability; but a part payment without such a qualification starts the statute running afresh as to the balance of the debt. It is by these part payments that notes are frequently kept alive for a long series of years. Interest payments are as effectual for the purpose as payments on account of part of the principal. A new six years begins to run from each payment of interest. The debtor may, however, say, "I will pay you half this debt," or, "I will pay you the debt in installments of $10 a month." Such promises are binding according to their terms, and do away with the statute of limitations to that extent, but they do not enable the creditor to recover anything more than the debtor promises. A question may be asked here which is

frequently of importance, regarding an outlawed note with a payment of interest thereon by the maker. Would an endorser who had waived demand and notice be liable for six years more? Yes, if the payment was made before the statute had completely run in favor of the endorser. Otherwise, no. And if the endorser had not waived demand and notice, the statute could in no case be prolonged against him by any act of the maker.

40. REVIVAL OF DEBTS DISCHARGED BY BANKRUPTCY OR VOIDABLE FOR INFANCY.—A somewhat similar sort of revival of an old obligation may occur where a debt is discharged in bankruptcy. If a discharged bankrupt promises to pay his indebtedness or makes a payment on account of it, it will revive his old obligation and he will be liable again. And, similarly, though one whom the law calls an infant (that is, a minor under the age of twenty-one) who incurs indebtedness prior to his majority, can avoid liability (unless the indebtedness was incurred for what are called necessaries, that is, food, clothing, shelter and things of that sort); yet if he promises after he has become of age that he will pay these debts, from which he might escape, thereafter he is liable.

CHAPTER III

Contracts Unenforceable for Lack of Writing or for Incapacity

41. CONTRACTS WHICH MUST BE IN WRITING.—There is in some contracts, one other requisite besides those already spoken of, necessary to make them enforceable, and that is a writing. We have already said that a writing is not, as such essential to the validity of a contract, but there are contracts of a few special kinds that the law requires to be in writing by virtue of a very old statute called the Statute of Frauds, because it is supposed to prevent fraud and perjury. Sometimes, however, it causes fraud and perjury. We will state briefly what contracts require a writing for their validity.

(1) Any contract for the sale of land, or any interest in or concerning land, requires a writing in order to make it binding. The commonest kind of contracts in regard to land are leases or contracts for leases. An oral lease creates what is called a "tenancy at will," that is, the agreement, in so far as it specifies a fixed term, is wholly invalid, but while the tenant occupies he must pay at the agreed rate; but he has no right to stay in; he may be turned out, even though he pays his rent promptly, on notice equal to the time between rent days; and, similarly, he has a right to go out on giving the same short notice.

(2) A contract in consideration of marriage, that is, for a marriage settlement, must be in writing.

(3) Guaranties.—This is a very important class and leads us to call attention to the distinction between a guaranty and a contract somewhat similar. Suppose A writes to Jordan, Marsh Company, "Please sell B six good shirts and charge the same to my account." That is not a guaranty. A is in that case a purchaser just as much as if he ordered the shirts sent around to himself. Nor is it any more a guaranty if it was further agreed between A and B that B should pay A for the shirts. On the other hand, if A should write to Jordan, Marsh Company, "Let B have six shirts and if he doesn't pay I will," then you would have a guaranty. It is of the essence of a guaranty that there should be a principal debtor and that the guarantor's liability should be only secondary. Now a guaranty must be in writing.

(4) An agreement not to be performed within a year must be in writing, and this provision of the statute has been the subject of rather an odd construction by the courts. The words "not to be performed within a year" have been construed to mean "which cannot possibly be performed within a year." Suppose A hires B for a year from to-morrow and contrast with that case a promise to hire B for B's life, or for the promisor's life. Now the first of those bargains is within the statute and must be

in writing, but the second, although it seems for a much longer period, being for the whole life of the promisor or promisee, is not within the statute. The man on whose death the promise depends may die within a year, so there is a possibility of performance within a year. A promise to employ B for all his life, since that may possibly be done within a year, therefore, need not be in writing. But a promise to hire a man for a year from to-morrow cannot be performed in a year. True, he may die within a year, and then the contract cannot be enforced, but there will not be performance. What was agreed was service for a year from to-morrow and that cannot possibly be done earlier than a year from to-morrow.

(5) A contract for the sale of goods exceeding in value a certain amount, must also be in writing unless part or all of the goods have been delivered or part or all of the price paid. The value of the goods which brings a bargain within this section of the Statute of Frauds varies in different States. In England the amount was fixed at £10, and most of our States in copying the English Statute have translated £10 into $50. In a few States, however, the amount has been changed. In Arkansas, Maine and Missouri, the amount is $30; in New Hampshire, $33; in Vermont, $40; in Connecticut and Michigan, $100; in California, Idaho, Montana and Utah, $200; in Arizona, Maryland, Massachusetts, New Jersey, Rhode Island, $500; in Ohio, $2,500.

This section of the Statute has not been enacted in a number of States, namely: Alabama, Delaware, Illinois, Kansas, Kentucky, Louisiana, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, Virginia and West Virginia. In these States oral sales and contracts to sell personal property to any amount are binding.

(6) Besides the kinds of contracts enumerated in the English statute and which have generally been adopted in this country there are two or three other classes of contracts which in a number of States are required by statute to be in writing. Of this sort is a contract to make a will. That is not a very common sort of contract, but sometimes a man promises in consideration of certain services to make a will in another's favor. The possibility of fraud in such cases is considerable. The testator is always dead before the question comes up, and then if the alleged promisee were allowed to prove by oral statements a contract to bequeath the testator's property on terms which the promisee says were agreed upon between them, it would afford a chance to produce the same effect as if oral wills were allowed. So a contract of a real estate agent for commissions, is in some States required to be in writing. A contract with an agent empowering him to sell real estate though not regarded at common law as within the prohibition of the section of the Statute for the sale of an interest in land to be in writing, is by special enactment in many States

required to be in writing. A contract for a loan of money reserving a rate of interest higher than that ordinarily allowed by law is sometimes required to be in writing.

42. WHAT CONSTITUTES WRITING.—The writing being a matter of proof, it is not essential that it be made at the time the contract is entered into. If made at any time before an action upon the contract is begun, that is a sufficient compliance with the statute. The writing, in order to be sufficient, must show who the parties to the agreement are, if not by naming them, by such a description as points to a specific person. Thus a letter addressed simply "Sir," and signed by the party charged, but not containing the name of the person addressed, is not sufficient. It is also required that all the terms of the contract appear in the writing, such as the subject matter, price, terms of credit or any express warranty, but, as often happens, they need not all be expressed in one writing. Contracts are frequently made as the result of an extended correspondence, and in such a case the various letters can be put together and construed as one writing if they obviously refer to one another, and thus all the terms appear in writing. The statutes in some States require "subscription" of the signature, and in that case the signing must be at an end; but where there is not such requirement a signing in the body of the instrument is sufficient.

43. ALTERATION OF WRITTEN CON-

TRACT BY SPOKEN WORDS.—Failure to understand and observe the rule restricting parol evidence to vary written contracts leads to a great deal of trouble. The parol evidence rule is this: where parties have executed a written contract purporting to state the terms of their agreement the court will not receive evidence that they orally agreed to something less or more or different, at or before the time when the written agreement was executed. That written agreement is taken as conclusive of the contract which the parties made at that time. In trying to ascertain what the writing means, however, the court will permit the surrounding circumstances to be shown, and the meaning of technical or trade terms or abbreviations may be proved. It may be shown also that the parties did not intend the written agreement to be effective until some particular event happened; but if the writing was executed as an expression of the intention of the parties at that time, the only endeavor of the court will be to ascertain the meaning of the written words and to enforce them as written. The question of oral agreements made subsequent to the writing is not so simple. We must here distinguish between (1) contracts of which the law requires written evidence because they are within the Statute of Frauds, and (2) contracts which the law does not require to be in writing, but which, nevertheless, are written. Contracts of the latter sort may be rescinded, added to or subtracted from by any

subsequent agreement which conforms to the requirements of the law governing mutual consent and consideration, though of course it is very desirable, to avoid dispute, that any variation or rescission of a written contract should itself be in writing. If, however, the Statute of Frauds required the original contract to be in writing, though it may orally be rescinded, it cannot be varied by oral agreement. To permit such an oral agreement would in effect violate the Statute of Frauds by permitting an agreement partly in writing but partly oral to be enforced. Thus if a written contract for the sale of goods (exceeding in value the amount permitted to be contracted for orally) was made, and the parties afterwards orally agreed to change the price, the time of delivery, or any other terms of the contract, the subsequent oral agreement would be invalid.

44. CAPACITY OF PARTIES.—All persons are ordinarily presumed to be capable of contracting, but the law imposes upon some—in varying amounts and for their own protection—disabilities to make contracts which may be enforced against them; and, upon some, for considerations of public policy, disabilities to make enforceable contracts. These persons are (1) Infants; (2) Insane persons; (3) Drunkards; (4) Married women—to a limited extent; (5) Aliens; (6) Artificial persons or corporations.

45. WHO ARE INFANTS.—All persons under the age of twenty-one are considered infants, ex-

cept that in some States, by statute, women attain their majority at eighteen. The law endeavors to protect those who have not experience and judgment against the loss of their property because of their inability to deal safely with others who might take an advantage of that fact. It may well be that one who has nearly attained his majority is as able in fact to protect his interests as one of full age, but the essence of law is that it is a rule of universal application, and the law cannot measure the ability in each particular case. To do the greatest good for the greatest number, therefore, it conclusively presumes that those under twenty-one have not yet gained the ability to cope with others in the preservation of their property.

46. CONTRACTS OF AN INFANT.—An infant's contracts are voidable; that is, though they bind the other party to the bargain the infant himself may avoid them. If he avoids them the adult with whom he contracted is entitled to recover whatever he may have given the infant which still remains in the latter's possession; but if the infant has spent or used, or for any reason no longer has the consideration which the adult gave him, the infant may avoid his own obligation if he has not already performed it, and if he has already performed it he may reclaim what he has given. After he comes of age, but not before, the infant may ratify his contracts and they then become binding upon him. The retention after coming of age of

property received by the infant during his minority amounts to a ratification. There are a few obligations of an infant which on grounds of public policy are binding upon him. This is true of a contract to perform military service. The marriage of an infant is binding though his engagement is not. It is frequently said that his contract for necessaries is binding; strictly this is not true. The infant is liable for necessaries, but his obligation does not depend upon his contract; it is an obligation imposed by law—what has been called a quasi-contract. The importance of this distinction is shown if the price agreed upon exceeded the real value of the necessaries. If the contract were binding, the infant would be bound to pay the agreed price, but in fact he is liable only for the fair value.

What are necessary for an infant depends upon his station in life, upon whether he already has a sufficient supply of the necessary article in question, and upon whether he is receiving proper support from a parent or guardian. The privilege of an infant is generally held to exist even though the party with whom he was dealing not only reasonably believed the infant to be of age, but though the infant had made actual representations to that effect.

47. INSANE PERSONS AND DRUNKARDS. —The law affords protection to insane persons and, to a less extent, to drunkards, for the same reason as in the case of infants; namely, that those who are

incapable of understanding what they are doing and of comprehending the effect of their contracts upon their property, should be safeguarded against the designs of the more capable. This protection is given them by declaring some of their contracts void; and allowing them, or those legally representing them, to avoid all others with the exception of a few. Also, as in the case of infants, this privilege as to such contracts is for the insane person's protection only, and the other party to the contract may not avoid it by pleading that it was made with an incompetent person.

48. WHOM DOES THE LAW CONSIDER INSANE?—Modern science has clearly established that a person may be insane on one subject, and yet possess a clear understanding and be perfectly sound on another. If the contract deals with a subject of which the person has a clear understanding, he is not in need of protection and is given none. Those only are given the protection who do not possess the mind to understand in a reasonable manner the nature and effect of the act in which they engage.

49. BINDING OBLIGATIONS FOR NECESSARIES.—The insane must live as well as the sane; consequently they are bound to pay for necessaries furnished them but only the reasonable value, as has been explained in the case of infants. The rules for determining what these necessaries may be are the same as in the case of infants.

50. OTHER CONTRACTS.—It is often a difficult matter to know when a person is insane, much more difficult than it is to determine a person's age. One of the contracting parties may have acted in perfect good faith, being ignorant of the other's unsoundness of mind and having no judicial determination of insanity or other warning to put him on his guard. The contract even may be reasonable in its terms, and it may have been so acted upon that the parties to it cannot be restored to their original position. In such a case, while the law should protect the incompetent it would be clear injustice to protect him to such an extent as to make the other party suffer through no fault of his own. It has been quite generally determined in this country, therefore, that where a person does not know of the other's insanity and there has been no judicial determination of such insanity to notify the world of it, and the contract is a fair one, and has been so acted upon that the parties cannot be restored to their original position, it is binding upon the lunatic as well as upon the other party.

51. VOID CONTRACTS.—In some States it is held, however, that all contracts of an insane person are void. In such States the rule above stated would not hold. The law of each State must be consulted to determine the law in the particular State. In some States, notably New York and Massachusetts, an insane person's deed of lands has been held to be void, without reference to whether

or not the other party entered into the contract in good faith without notice, or that it has been so far acted upon that the parties cannot be restored to their original position. As in the case of infants, an insane person's power of attorney has been declared by high authority to be absolutely void.

52. VOIDABLE CONTRACTS.—In most jurisdictions an insane person's contracts are voidable by him or by his guardian, provided (1) that the other person knew of his insanity at the time of making the contract, (2) or he had been declared insane by some court, (3) or the parties can be restored to their original position.

53. RATIFICATION AND AVOIDANCE.—When the insane person's reason has been restored, if the contract is a voidable one, as explained in the foregoing rules, though he may by acts or words avoid the contract he made during his insanity; he may in like manner ratify it; or he may ratify it by not avoiding it within a reasonable time after recovering his reason while continuing to keep something capable of being returned, which he obtained from the contract.

54. WHAT CONSTITUTES DRUNKENNESS.—It is not ordinary drunkenness which excuses a man from his contracts, and enables him to claim the protection given generally to incapable persons. The person must have been utterly deprived of his reason and understanding, so that he could not comprehend the nature or effect of the act

in which he was engaged. That he was so much under the influence of liquor that his judgment was not as good as in his normal state does not excuse him.

55. MARRIED WOMEN.—It is practically impossible to state in brief form the law upon the subject of married women's contracts. The difficulty arises from the diverse changes made in the plain and clear rules of the common law by statutes in the different States. The old law is wholly incompatible with the enlightened view now held in regard to women, their family, social and business standing, and the changes have been made to give them the rights to which they are justly entitled. But, inasmuch as the statutes have not been uniform in the different States, the law today is not wholly uniform. The statutes and decisions in each State must be consulted to determine the law on the subject as it is today. Through these changes the law has become very complicated, and business men should obtain legal advice before entering into important business dealings with married women.

56. THE OLD RULE.—Upon her marriage a woman's existence became merged in that of her husband, and the husband and wife were regarded for many purposes as one person. What tangible personal property she had became his immediately upon marriage, and he had the right to reduce her bills, notes, bonds and other debts to his possession. Her real property she retained the title to, subject to

the right of the husband to have the use of it during his life, if children were born of the marriage. He was bound to supply her with necessaries, and so long as he did this her contracts for things of even ordinary use were void; but if he failed to supply the necessaries her contract for them would be valid. All her other contracts were absolutely void—not voidable. Her position, then, was worse than an infant's. She could have personal property of her own only if it was given to someone else to hold the title and pay over the income to her, and even this "separate estate," as it was called, could not be bound by her contracts.

57. CHANGES MADE BY STATUTE.—The law of married women's contracts has been greatly changed by legislative enactments, to give married women the rights which the more enlightened view of the present time accords to them. The first changes aimed pretty generally to give her greater rights over her "separate estate," giving her power to make binding contracts with reference to it, or to make binding contracts if she were carrying on a trade or business of her own. But the earlier statutes frequently did not give her power to contract with her husband, or to make binding contracts if she had no separate estate, or was not carrying on a separate business. Later enactments have largely corrected these defects, but the old rule still stands except as it has been changed by statute, and, therefore, the statutes of each State and the decisions in-

terpreting them must be consulted to determine accurately the law in each State. It may, however, be said that generally a married woman may now contract except with her husband, and except as surety for him. In many States she can even make contracts of these excepted classes.

58. ALIENS.—An alien is one born out of the jurisdiction of the United States, of a father not a citizen of this country, and who has not been naturalized. In times of peace, aliens may hold property and make contracts and seek the protection of our courts as freely as citizens. When war breaks out between this country and another the making of contracts between citizens of the two countries is prohibited. If such contracts are made during a state of war, they are illegal and void, and the courts of this country will not lend their aid to enforce them, either during the war or after its termination. Contracts made before the war breaks out are good, but cannot be enforced, nor can remedies for their breach be obtained, while the war is in progress. When the war ceases, however, the courts will lend their aid to the enforcement of such contracts.

59. CORPORATIONS.—A corporation may contract as freely as an individual so long as its contracts are within the business powers and scope of the business which its charter authorizes it to conduct. And even if a corporation has made a contract outside of the scope of its business, and the contract has been acted upon so that either party

has had the benefit of the contract, an action will lie in favor of the other for the benefits so conferred. But a contract outside of the business which its charter permits the corporation to engage in, and which is wholly executory, the courts will not enforce. Such contracts are said to be ultra vires. Contracts with a corporation may be in the same form as contracts between individuals, and the corporation need use its seal only where an ordinary person is required to use one. The officer or officers making the contract on behalf of a corporation must, however, be authorized so to do either by the directors or by the general powers attached to such officers. In law corporations are deemed to be artificial persons subject in a general way to provisions governing natural persons.

CHAPTER IV

Performance of Contracts

60. PRIMARY RULE.—Now we have got our contract formed. After that it does not make much difference whether it is under seal or whether it is a simple contract; the rules governing the contract subsequent to its formation are very much the same though there are a few distinctions. The primary rule running through the law governing obligations to perform contracts is that if a man has once formed a good contract he must do as he agreed, and if he fails substantially (not merely slightly) to do so the other party may refuse to perform on his part. If you remember that fundamental principle you cannot generally go far wrong.

61. CONDITIONAL CONTRACTS—INSURANCE.—But now what does he agree? That often may depend on certain conditions he states in his promise. Take the insurance policy previously alluded to. An insurance company promises to pay $5,000, but it does not promise to pay in any event; the condition "if the house burns down" is obviously a qualification of the promise. But there are other conditions in the insurance policy. The insurance company says it will not be liable if gasolene is kept in the house beyond a small quantity necessary for cleaning. That, too, is a condition of its promise to pay $5,000; so that "if the house

burns down," "if gasolene is not kept in the house," "if the house is not unoccupied more than three months," and "if mechanics are not allowed in possession of the property for more than a certain length of time," are all conditions, and the company's main promise need only be kept if the conditions are complied with. That is why an insurance policy is not always quite as good as it seems —because there is a large promise in large print; but there are a good many qualifications in smaller print which are really part of the promise and must be taken into account.

62. CONDITIONS IN BUILDING CONTRACTS.—Another kind of conditional promise often occurs in building contracts. The employer agrees to pay the builder or contractor on the production of an architect's certificate. Now it doesn't do the builder any good to build that house unless he gets the architect's certificate, for he has been promised pay only on condition that he produce it. That is the promise between the parties. That is the only promise.

63. WHEN PERFORMANCE OF CONDITIONS IS EXCUSED.—It is obvious that these conditions in promises may be sometimes used to defeat the ends of justice, and undoubtedly they are so used sometimes. A person who draws a contract cleverly will put in a great many conditions qualifying his own liability, and will try to make the promise on the other side as unconditional as possi-

ble. The law cannot wholly do away with these conditions, because in general, so long as parties do not make illegal bargains, they have a right to make such bargains as suit themselves. The court cannot make their agreement for them, but it is held that if a condition will lead to a real forfeiture by an innocent promisee, the law will relieve the promisee. Thus, in the architect's certificate case, if the house was properly built and it was merely ill temper on the part of the architect that prevented him from giving the certificate, the court would allow the builder to recover, and even if the architect had some good reason for refusing the certificate, the court would not allow the builder to be permanently prevented from recovering anything on the contract, providing the builder had substantially though not entirely performed his contract and had acted in good faith. If, however, his default was willful, if he had tried to beat the specifications, and the architect had found him out and therefore refused the certificate, the only thing the builder could do would be to go at it again, tear out his faulty construction, and build as he had agreed.

64. IN CONTRACTS OF EMPLOYMENT, WORK MUST BE PERFORMED BEFORE PAYMENT IS DUE.—There are other matters which qualify the obligation of a promisor to perform besides express conditions such as those we have alluded to. Take this case: John promises to work for the A. B. Company; the A. B. Company

promises to employ him and to pay him a salary of $1,000 a year. John comes to work the first day and works awhile, and then he says he would like his thousand dollars. The A. B. Company says, "Well, you have got to do your work first." John says, "Why should I work first and trust you for pay, rather than you pay first and trust me for the work? I will keep on working, but I want the pay now." Of course, the employer is right in refusing to pay until the work has been done, even though the promise of the employer is not expressly qualified by the statement that after the work has been done he will pay $1,000. It has been dictated by custom, rather than by anything else, that where work is to be performed on one side and money to be paid on the other, in the absence of any statement in the contract to the contrary, the work must be done before the pay is given. The result is this: that John must work anyway, his promise to work being absolute; but the employer's promise to pay the money is, in effect, conditional. It is subject to an implied condition, as it is called, that John shall have done the work he agreed to do. The promise of the employer is, in effect, "I will pay if you previously have done the work." But John's promise is absolute: "I will work." He has to trust for the pay.

65. PERFORMANCE FIRST DUE UNDER A CONTRACT MUST BE GIVEN BEFORE PERFORMANCE SUBSEQUENTLY DUE

FROM THE OTHER PARTY CAN BE DEMANDED.—And that case is an illustration of a broader principle which may be stated in this way: where the performance promised one party to a contract is to precede in time the performance by the other side, the party who is to perform first is bound absolutely to perform; whereas the party who is to perform subsequently may refuse to perform unless and until the other party performs. In the cases thus far alluded to, the promises of the two parties could not be performed at the same time. You cannot work for a year and pay $1,000 simultaneously. One performance takes a whole year and the other performance takes only a moment.

66. PERFORMANCES CONCURRENTLY DUE.—But frequently there arise cases where both promises can take place at the same time. The commonest illustration of that is a contract to buy and sell. You can pay the price and hand over the goods simultaneously, and when a contract is of this character, that is, where both performances can be rendered at the same time, the rule is that in the absence of agreement to the contrary, they must be performed simultaneously.. John agrees to buy James' horse and pay $200 for it, and James agrees to sell the horse for $200; that is a bilateral contract of purchase and sale. Now suppose neither party does anything, has each party broken his promise? It might seem so, for John has not bought the horse or paid for it as he agreed, nor has James sold the

horse. But where each party is bound to perform simultaneously with the other, if either wants to acquire any rights under the contract he must do what is called putting the other party in default, that is, he must offer to perform himself. John, therefore, must go to James, offer $200 and demand the horse if he wants to assert that James has broken his contract. And James, on the other hand, if he wishes to enforce the contract, must go with the horse to John and say, "Here is the horse which I will hand over to you on receiving simultaneously the $200 which you promised me for it." The obligation of the two promises when they can be performed simultaneously is called concurrently conditional, that is, each party has a concurrent right to performance by the other, and has a right to refuse performance until he receives, concurrently with his own performance, performance by the other party.

67. INSTALLMENT CONTRACTS.—Sometimes contracts are more complicated than those which we have stated, such as contracts of service and contracts to buy and sell. This, for instance, is a type of a very common sort of contract in business: a leather manufacturer uses large quantities of tanning extract in his tannery. He makes a contract for a regular supply, so many barrels each week for a year, for which he agrees to pay a specified price a barrel on delivery. The extract promised him is sent for some time just as agreed. We

will suppose, then, perhaps the extract manufacturer is slow in sending what he promised; there is a delay; perhaps the extract that is furnished is not as good as it was or as the contract called for. What can the leather manufacturer do about it? Of course, he can keep on with the contract, taking what the extract manufacturer sends him, getting as much performance as he can, and sue for such damages as he may suffer because of the failure to give what was promised completely. But he does not always want to do that. Suppose it is necessary for his business that he should get tanning extract and get it regularly. He does not want to wait and take chances on the extract manufacturer's delays in delivery and inferiorities in quality. He wants to make a contract with somebody else and get out of his bargain with the first extract manufacturer altogether. May he do so? No question in contracts comes up in business more often than that. And the answer to the question is this: it depends on the materiality of the breach, taking into consideration the terms of the contract and the extent of the default. Is the breach so serious as to make it fair and just in a business sense to call the contract wholly off; or will justice be better obtained by making the injured party keep on with the contract and seek redress in damages for any minor default.

68. MATERIALITY OF BREACH IN CONTRACTS OF EMPLOYMENT.—The same thing comes up very often in contracts of employment.

Suppose an employer hires an employee for a year, and in the course of the year the employee at some time or other fails to fulfill his contractual duty as an employee. He is negligent and in some respect fails to comply with his contract to render good and efficient service. Can the employer discharge him? We must ask how serious is the breach. A merely negligent breach of duty is not so serious as one which is willful. Or the breach might be on the other side of the contract. Suppose the employer has promised to pay a certain sum each month as salary during the year, and does not pay promptly. Has the employee a right to say, "You pay my salary on the first day of the month as you agreed, or I leave"? No, he does not have a right to speak so positively as that. A single day's delay in the payment of one month's installment of salary would not justify throwing up a year's contract. On the other hand, if the delay ran along for any considerable time, it would justify the employee in refusing to continue. You will see that this principle of materiality of the breach on one side as justifying a refusal to perform on the other is rather an indefinite one. It involves questions of degree. That is so in the nature of the case. The indefiniteness of the rule cannot very well be helped.

69. ILLUSTRATIONS AND DISTINCTIONS.—A few concrete illustrations may help to bring out the points under discussion.

Suppose an agreement for the sale of real estate,

and, for instance, the buyer is unable to be on hand the day the sale is to be completed, and the owner is present, and finding the buyer absent immediately sells the land to another. Now is there any action against the owner, or might he justly refuse to go on with the contract because of the momentary breach of contract? No, he cannot refuse to go on in the case of a contract of that sort to sell real estate, unless the contract very expressly provided that the transaction must be carried through at the specified time and place or not at all. The case would be governed otherwise by the principle of materiality of the breach, to which we have alluded. A brief delay would not be a sufficiently material breach to justify the seller in refusing to go on, but a long delay, of course, would be sufficient. In sales of personal property time is regarded by the law as more important than in sales of land. In contracts to sell stocks varying rapidly in value, a very short time might be essential.

Suppose now an option for a piece of land was given by the owner. May he dispose of the land to another a few minutes after the time specified in the option for the acceptance of the offer? That is different from the case previously put. The option is in effect an offer to make a sale, and the offer is by its terms to expire, we will say, at 12 o'clock, noon, October 23. It will expire at that time, and an acceptance a minute later will be too late. The difference is in the terms of the promise

made by the different parties. In the case put first, there is an unqualified contract to buy and sell, and then there is the further agreement that the contract be carried out at 12 o'clock, October 23. In the case now put there is a promise to sell only if the price is tendered or if acceptance is made prior to 12 o'clock, noon, October 23. The terms of the option, assuming in its favor that it was given for consideration or was under seal and therefore not merely a revocable offer, were expressly conditional. The vital thing in contracts is to be sure of the terms of your promise. The term option indicates a right which exists up to a certain point; beyond that point there is no right.

70. PROSPECTIVE INABILITY OF ONE PARTY EXCUSES THE OTHER.—There is one other thing besides actual breach by his co-contractor, which justifies one party to a contract in refusing to go on with the contract, and that may be called prospective inability to perform on the part of the other side.

71. INSOLVENCY OR BANKRUPTCY.—Let us give one or two illustrations of that. You have entered into a contract to sell a merchant 100 barrels of flour on thirty days' credit. The time has come for delivery of the flour, but the merchant is insolvent. He says to you, "I want you to deliver that flour; the agreed day has come." You say, "But you cannot pay for the flour." "Well," he replies, "it is not time to pay for it. You agreed to

give me thirty days' credit; perhaps I shall be able to pay all right then. I have not broken my promise yet, and as long as I am not in default in my promise you have no right to break yours." You have a right to refuse to deliver the flour because, though the buyer has not yet broken his contract, the prospect of his being able to keep it, in view of his insolvency, is so slight that his prospective inability to perform in the future when the time comes excuses you from going on now. Insolvency or bankruptcy of one party to a contract will always excuse the other party from giving credit or going on with an executory contract, unless concurrent performance is made by the insolvent party or security given for future performance.

72. REPUDIATION.—So will repudiation, as it is called, of a contract by one party. Repudiation means a wrongful assertion by one party to a contract that he is not going to perform in the future what he agreed. After such repudiation the other party may say, "I am not going to perform now what I agreed to perform, since you have said you will not perform in the future what you agreed. I shall not go ahead and trust you, even though I did by the contract agree to give you credit, in view of the fact that you have now repudiated your agreement by saying that you are not going to do what you agreed." Repudiation may be indicated by acts as well as by words, and often is indicated partly by words and partly by acts.

73. TRANSFER OF PROPERTY TO WHICH THE CONTRACT RELATES.—Still another illustration of prospective inability arises where a contract relates to specific property, as a certain piece of land, and before the time for performance comes, the owner of the land who had agreed to sell it, we will suppose, transfers it to somebody else or mortgages it. The man who had agreed to buy that piece of land may withdraw from the contract. He may say, "You might get the land back at the time you agreed to perform, but I am not going to take any chances on that. I am off the bargain altogether."

74. IMPORTANCE OF EXACT PROVISIONS IN CONTRACTS.—So much for the rather difficult subject of the mutual duties of parties to a contract in the performance of it. The best way to avoid doubt or uncertainty in such matters is to provide very exactly in the contract what the rights of the parties shall be in certain contingencies. The law always respects the intention of the parties when it is manifested, and it is only when they have said nothing about their intention that the rules which we have considered become important.

75. FRAUD.—The next question in regard to contracts arises out of certain grounds of defence that may come up and the most important of these is fraud. Fraud is deception; it is inducing the other party to believe something which is not true,

and, by inducing him to believe that, influencing his action. The ordinary way in which fraud is manifested is by misrepresentations. A purchase or sale of stock or of goods may be induced by fraud. A loan may be obtained from a bank by fraud, that is, by misrepresentation of material facts which influence the other side to act.

76. MISSTATEMENTS OF OPINION ARE NOT FRAUDULENT.—Now what kind of misrepresentation amounts to fraud? There must be misrepresentation of a fact. Merely misrepresentation of opinion is insufficient, and what is opinion and what is fact has been the basis of a good many lawsuits. John offers his horse to James for sale at $300. He says that it is the best horse in town. Well, it is not the best horse in town by a good deal, but that sort of statement cannot be the basis of an allegation of fraud. That a thing is "good," or "the best in the market," or similar general statements, all of which ought to be known to the hearer to be simply expressions of opinion, are not statements of positive fact. Take these two statements in regard to the horse. "He can trot very fast." That is a mere statement of opinion. To some minds eight miles an hour is very fast; to more enterprising persons fifteen miles an hour is necessary in order to make travel seem fast. Those are matters of opinion. But a statement that the horse can trot twelve miles an hour, or has trotted one mile in three minutes on the track, are statements

of fact, and if untrue are fraudulent. A statement of value is a statement of opinion and cannot be the basis of fraud. A statement that the horse is worth $300, or is worth twice as much as the owner is asking for him, cannot be relied upon; but a statement that $300 was paid for this horse, or was offered for him, is an assertion of fact, and if untrue would be the basis of an allegation of fraud.

77. PROMISES ARE NOT FRAUDULENT BECAUSE BROKEN.—A promise is not a statement of fact. A man may promise to do something and fail to carry out the promise, and in consequence the person he was dealing with may regret the bargain he entered into, but his only remedy is to sue for damages for breach of the promise if it was part of a contract. He cannot assert that merely because the promise was not kept the transaction was fraudulent. But if a man makes a promise knowing when he makes it that he cannot keep it, he is committing a fraud. The commonest illustration of this is where a man buys goods on credit, having at the time an intention not to pay for them, or well knowing that he cannot pay for them.

78. STATEMENTS MUST HAVE BEEN CALCULATED TO INDUCE ACTION.—Generally speaking, the statement relied on as fraudulent must have been made with the purpose of inducing action. For instance, suppose John likes to tell large stories. He tells James things about his neighbor's horse. John does not do this for any

purpose except to brag about living near a man who has such a splendid horse, but James suddenly takes the notion he would like to have that horse and he goes and buys it. Now it was not legal fraud on John's part to tell those lies about the horse, even though they did induce James to go and buy it, unless John, as a reasonable man, ought to have known that James was likely to buy the horse, as might have been the case if James had been talking about buying him. Then it would be fraud, and it would not make any difference in regard to its being fraudulent that John had nothing to gain by telling these lies, that he was simply doing it for the fun of the thing.

79. REMEDIES FOR FRAUD.—What remedy has the defrauded person? The law gives him two remedies of which he may take his choice; he cannot have both, but he can have either. One is to sue the fraudulent person for such damages as have been suffered, and the other is to rescind the transaction, to get back what has been given, or to refuse to go on with the contract at all if it is still wholly executory.

80. DURESS AND UNDUE INFLUENCE.—There are certain defences similar to fraud; duress, or undue influence, is one of them. That is comparativly rare. It is compelling a person to do what he does not want to do, making him agree to a bargain that he would not agree to accept under compulsion, as by fear of personal violence or imprison-

ment; and a bargain made under these circumstances can be rescinded or set aside. Merely threatening to enforce your legal rights by suit against another is not duress, though it may in fact induce him to agree to what he would not otherwise have agreed; but to threaten criminal prosecution as a means of extorting money or inducing an agreement is illegal and in many jurisdictions is itself a crime.

81. MISTAKE OF FACT.—In certain cases, also, a mutual mistake of a vital fact is ground for setting aside a contract, but these cases are not very common. Mistakes generally do not prevent the enforcement of contracts. Usually where there is a mistake, it is of a character for which one party or the other is to blame. If the mistake arises out of deception it is fraud. If the mistake arises simply because the mistaken party has failed to inform himself, as he might have done, of the facts, then it is no defence at all. But if both parties were acting under the mutual assumption that some vital fact was true in making a bargain, either one of them may avoid or rescind the bargain when it appears they were both mistaken.

82. IMPOSSIBILITY.—Impossibility is sometimes a defence to the performance of a contract. Perhaps the simplest illustration of this arises in a contract for personal services of any kind. Illness or death of the person who promises the services excuses performance. Death does not usually ter-

minate a contract or serve as a defence to it. If a man contracts to sell 100 bushels of grain and dies the next day his estate is liable on the contract just as if he continued alive; but if he agreed to hire a man as an employee for a year, his death or the employee's death within the year would terminate the obligation of both. Unexpected difficulty is not impossibility. For instance, take a building contract: the builder agrees to put up a building within a certain time; he is prevented by strikes. Nevertheless, he is liable for not doing as he agreed. He should have put a condition in his promise qualifying his agreement to build by the provisions that if strikes prevented he would not be liable. So, if the foundation gave way and the building tumbled down before it was finished, the builder must put it up again. So, if it was struck by lightning, he must put it up again.

83. ILLEGAL CONTRACTS.—One other matter in regard to contracts and defences to them is illegality. Some kinds of illegal contracts are so obviously illegal that it is not necessary to say anything about them. Anybody would know that they were illegal and that they would not be enforced because they were illegal. A contract to steal or murder or take part in any crime is of this sort. But other kinds of illegal contracts are not so obviously wicked as to make it clear that they are unenforceable. It may be worth while to mention a few of these kinds of illegality.

84. CONTRACTS IN RESTRAINT OF TRADE.—One kind which has become very important in late years in business is contracts in restraint of trade, so called. The original contracts in restraint of trade were contracts by which one man agreed that he would not thereafter exercise his trade or profession, the object generally being that the promisee should be freed from the competition of the man who had promised to refrain from exercising his trade; and the law became settled a good many years ago that if the promise was general not to exercise the trade or profession anywhere or at any time it was illegal, but that if it was only for a reasonably limited space it would not be illegal. That old law still exists, but there has grown up further a much more important class of cases where contracts are made to further an attempted monopoly, and one may say pretty broadly that all such attempts are illegal. It does not matter how much business reason there is for it; any attempt to combine in order to get a monopoly, or in order to put up prices, is bad. Moreover, if the attempted restraint of trade or monopoly concerns interstate commerce, the agreement is a Federal crime under the Sherman law.

85. GAMBLING CONTRACTS.—Another kind of illegal contract is a gambling contract. This seems obvious in agreements for the more extreme kinds of gambling, but in certain business transactions, where the matter becomes important, the

dividing line is not so clear; especially in dealings on stock exchanges and exchanges for sales of staple products, such as grain, cotton and coffee. The stock exchanges and other exchanges are made the means of a great deal of speculation, which is virtually gambling. Now, in what cases does the law regard these transactions as gambling and unenforceable, and in what cases is the transaction legal? The answer is, if an actual delivery of the stock, or commodity bought, is contemplated, then the transaction is not gambling in the legal sense; but if a settlement merely of the differences in buying and selling prices is contemplated, as the only performance of the bargain, then the transaction is gambling. The difference is between a stock-exchange business and a bucket-shop business. If you give an order to a stock-exchange house to buy stock, even though you put up but a small margin and could put up but a small margin, and the stock-exchange house knows you could put up but a small margin, nevertheless, the stock-exchange house actually buys that stock, and it is delivered to it. The stock-exchange house would then have a right to demand of you that you pay for that stock in full and take delivery of it, and could sue you for the price if you failed to comply with the demand. In fact, it does not ordinarily do that. If it wants to get the price which you promised to pay, and you fail on demand to take up the stock, it sells the stock which it has been holding as security. The bucket-

shop, on the other hand, though it takes your order to buy, does not actually buy the stock; it simply settles with you when you want to settle, or when it wants to settle, because the margin is not sufficiently kept good, by calculating the difference between the price at which the stock was supposedly bought and the price at which it is supposedly sold, those prices being fixed by the ruling market quotations at the time. It would be perfectly possible to make a gambling transaction out of the stock-exchange transaction by a very slight change. If a stock-exchange house should agree, for instance, that the customer should not be compelled to take delivery of the stock, that added agreement would make the transaction between broker and customer a gambling transaction, even though the broker actually bought the stock on the exchange, and, as between himself and the other broker on the exchange with whom he dealt, there was a perfectly valid sale of the stock. In some jurisdictions by statute speculative contracts which are not gambling contracts at common law are made illegal.

86. BREACH OF FIDUCIARY DUTIES.—Another very important class of illegal transactions arises from breach of fiduciary duties. A fiduciary is pretty hard to define. He is somebody that owes a duty higher than a mere contractual obligation, a duty involving something of trust and confidence. A trustee is a fiduciary, so is an agent. A director or officer of a corporation is a fiduciary, and any

dealing in which a fiduciary violates his duty to the person for whom he is fiduciary is illegal, and any agreement for such a violation is an illegal contract. It is illegal for a trustee to bargain for any advantage from his trust other than his regular compensation. It would be illegal for a trustee to bargain with a bank to give the bank a trust account in return for some personal advantage, as a loan to be made to the trustee personally. It would be a breach of fiduciary duty for a corporation officer and director to bargain for any personal advantage by virtue of his official action.

87. KNOWLEDGE OF ANOTHER'S ILLEGAL PURPOSE.—The knowledge of another's illegal purpose will not make the person who knows of it himself guilty of illegality; but if one not only knows but in any way promotes the illegal purpose of another, he will be considered a party to the illegality. A may sell goods to B, knowing that B is going to use them illegally, and A's sale will not be illegal; but if A does anything to help B in using them illegally, or if the goods are of such a character that they can be used only illegally, then A would be guilty of illegality himself.

CHAPTER V

Assignment and Discharge of Contracts

88. MEANING OF ASSIGNMENTS.—Much of the difficulty regarding assignment of contracts is due to different meanings which may be attached to the word assignment. When property is assigned the assignee becomes the owner in every sense, if the person from whom he took the assignment had a valid title. This is not true of the assignment of contracts. By the common law, contract rights or "choses in action," as they are termed in law, were not assignable, the reason being simply that one who had contracted with A, cannot without his consent become bound to B.

89. POWER OF ATTORNEY TO COLLECT A CLAIM.—Though when a man had a contract right he could not by common law make B in a complete sense the owner of the claim; he could give B a power to collect the claim as his, A's, agent, and authorize him to keep the proceeds when the claim was collected. It long ago became established that when an owner of a claim purported to make an assignment of a claim he thereby gave the assignee the power to enforce the claim in his stead, and this power given the assignee is irrevocable.

90. EFFECT OF ASSIGNMENT OF RIGHTS.—It may be supposed that the effect of an assignment of a right, though the result may be

worked out by treating the assignee as an agent or attorney of the assignor, is the same as if the assignee were fully substituted in the position of the assignor as owner of the claim, but this is not quite true. Assuming that the claim is not represented by negotiable paper, the legal owner of the claim is still the assignor. This is shown by the fact that if the debtor pays the assignor in ignorance of the assignment, the debt is discharged and the assignee can only go against his assignor for the latter's fraudulent conduct in collecting the claim after having assigned it. So, too, if the assignor makes a subsequent assignment, this subsequent assignee also has a power of attorney to collect the claim and keep the proceeds; so that if the second assignee in good faith collects the claim in ignorance of the prior assignment, he can keep what he has collected; nor is the debtor liable to the first assignee who must as before seek redress from his assignor. It is, therefore, always important for the assignee of a non-negotiable chose in action to give immediate notice of his assignment to the debtor. If after such notice the debtor should pay the assignor or a subsequent assignee, such payment would not discharge the debtor, and the first assignee could collect the claim from him.

91. NON-ASSIGNABLE RIGHTS.—Rights cannot be assigned which are personal in their nature. The one who has contracted to paint a picture cannot delegate the duty to another, no matter

how skillful. One who has a right to the personal services of an employee cannot assign that right to another. A publisher who has a right to publish all books written by a certain author cannot assign his right to another publisher.

92. ASSIGNMENT OF DUTIES.—The duties under a contract are not assignable under any circumstances. That is, one who owes money or is bound to any performance can not by any act of his own or by any act in agreement with any other person except his creditor, divest himself of liability and substitute the liability of another. This is sufficiently obvious when attention is called to it; for otherwise debtors would find an easy practical way of escaping from their debts by assigning the duty to pay to irresponsible persons. But the principle is not always recognized. A person who is subject to a duty, though he can not escape liability, may delegate the performance of his obligation provided the duty is of such a character that performance by an agent will be substantially the same thing as performance by the obligor himself. Thus if a contractor engages to build a house, he may delegate the actual building to another, but he cannot escape responsibility for the work. One who owes a mortgage may delegate the payment of the mortgage to a purchaser of the land who assumes and agrees to pay the debt. If the purchaser of the land actually pays, the debt is discharged; but, if he fails to do so, the mortgagee may sue the original mort-

gagor and the latter will be obliged to bring another action against the purchaser who promised to pay the debt and failed to do so. So where a partnership is changed and a new firm formed, it is very common for the new firm to assume the obligations of the old firm.

93. ORIGINAL DEBTOR NOT DISCHARGED UNLESS THERE IS A NOVATION.—Though a creditor cannot be deprived of his right against his original debtor without his consent, he may consent. If he does thus consent to take in lieu of the obligation of his original debtor that of the person who assumed the debt, what is called a novation is created. That frequently happens where a new firm succeeds an old one. The new firm goes on dealing with the old creditors, and they impliedly, if not expressly, assent to taking the new firm instead of the old firm as a debtor. But in order to make out a novation you have got to find as a fact that the creditor agreed to give up his right against the old debtor. If the creditor does not assent to a novation then the situation is that the creditor retains his claim against the old debtor, but the person who has assumed debt has contracted to pay that debt. If he keeps his contract he will pay it and the debt will be cancelled. If he does not keep his contract the creditor will sue the original debtor and the original debtor will sue the man who assumed the debt.

94. ASSIGNMENT OF BILATERAL CON-

TRACTS.—In bilateral contracts each party is under a duty to perform his promise, and also has a right to the performance of the other party. If an attempt is made to assign such a contract the effect is this: the assignor delegates to the assignee the duty of performing the assignor's promise, but the assignor himself still remains liable if his agent, the assignee, fails to carry out the duty. Further, the assignor authorizes the assignee to receive the payment or performance due from the other party to the contract and to keep it for himself.

95. WHAT AMOUNTS TO AN ASSIGNMENT.—No particular words are necessary to constitute an assignment. Any words which show an intention that another shall be the owner of a right are sufficient to constitute the latter an assignee. Especially it should be observed that an order directed to a debtor of the drawer ordering him to pay the debt to a named payee, is an assignment of the debt when delivered to the payee. This case must sharply be distinguished from a bill of exchange or check. A bill of exchange or check is an order to pay a certain amount unconditionally, irrespective of the existence of any particular fund. It is only an order to pay from a particular fund, that is, an order which is conditional expressly or impliedly on the existence of that fund, which constitutes an assignment.

96. PARTIAL ASSIGNMENT.—A creditor may not only assign his whole claim to an assignee,

but he may assign part of it. Such a partial assignment authorizes the assignee to collect the portion of the claim assigned and keep it for himself. But the debtor is not bound to pay the claim piecemeal; he may insist on making but a single payment unless his contract with his creditor provided otherwise. A bank in accepting a deposit does contract to pay any such amounts as the depositor may indicate by drawing checks, but an ordinary debtor who owes $100 cannot be required to pay in such amounts as his creditor may see fit to demand. For this reason a few courts hold that even if the debtor has notice of a partial assignment, he may pay the whole debt to the original creditor though that results in defrauding the partial assignee. Most courts hold, however, that the debtor when notified of the facts cannot do this, and if he objects to paying fractional parts of his indebtedness he must pay the whole sum into court to be distributed by it among the parties entitled.

97. ASSIGNMENT OF FUTURE CLAIMS.—Assignments of future claims, as well as of existing claims, may be made, but there are in many States some special provisions of statute law in regard to assigning future wages. Such assignments must often be recorded, and there are certain other special statutory provisions in regard to them. The assignment of future debts is also subject to this qualification: The law does not allow the assignment of a future claim unless the contract or em-

ployment out of which the claim is expected to arise has already been made or is already in existence.

98. DISCHARGE OF CONTRACTS.—Contracts are discharged in much the same way as they are made. The simplest way of discharging a contract is by performing it. When both parties do exactly what they agreed to do the contract is discharged by performance. Where seals still retain their common law effect, it may be discharged without performance by agreement under seal that it shall be discharged, just as a contract may be made by an agreement under seal. The agreement under seal to discharge a contract is called a release. You may release any right that you have—a right for money, a right to have work done or any right. Just as contracts may be made either under seal or by an agreement with consideration, so they may be discharged not only by a release under seal but by an agreement for rescission of the contract. But this agreement must have consideration.

99. ILLUSTRATIONS.—Suppose A has promised to build a house and B has promised to pay $10,000 for it. Before anything has been done, A and B agree to call that contract off. That is a valid agreement for rescission, because each party agrees to give up something—one party to give up his right to have the house built, the other party to give up the right to get $10,000 pay. So an agreement between employer and employee that a contract shall be terminated before the time originally

agreed, has sufficient consideration—the employer gives up his right to the employee's services, the employee gives up his right for future pay. But compare with these this case: A owes B a thousand dollars: it is simply a debt. A and B agree to call that square. That agreement is of no validity, for here only one party agrees to give up anything. The creditor agrees to give up his thousand dollars, and he does not get any promised amount in return for it. But that obligation, that debt, could be satisfied if valid consideration were given for the surrender of the claim; and anything agreed upon, as a horse, or ten shares of stock, or anything else the parties agreed to, would be good consideration for the agreement to surrender the claim, so long as one did not get into the difficulty alluded to under the heading of consideration, of trying to surrender a right to a larger liquidated sum in consideration of the payment of a smaller sum of money.

100. SENDING A CHECK AS FULL PAYMENT.—It is very common for a debtor in making payment by check of his debt to seek to make the check operate as a receipt in full of all claims by the creditor against him. He may do this by writing on the check itself that it is "in full of all demands" or "in full payment" of a certain bill; or he may by a letter accompanying the check state that the check is sent as full satisfaction. The acceptance by the creditor of the check under either of these circumstances is an assent by him to the proposition

stated on the check or in the accompanying letter, that the check is in full payment. Such an assent, however, does not necessarily prove that the debtor is discharged; consideration as well as mutual assent is essential to the validity of any agreement which is not under seal. Accordingly if the debt was a liquidated and undisputed one, and the check was for less than the amount due, the agreement of the creditor to take it in full satisfaction is not supported by sufficient consideration under principles previously considered. On the other hand, if the debt was an unliquidated one, or there was an honest dispute in regard to the amount due, the creditor's claim is fully satisfied.

101. RECEIPT IN FULL.—It may be said generally that though a receipt in full is often thought by business men to be a discharge irrespective of consideration, like a release, this is not true in most States. A receipt in full is good evidence if payment has been made in full that it has been so made; but where payment has not been made in full a receipt will not be effectual without consideration, as a release under seal would be.

102. RENUNCIATION OF OBLIGATION ON NEGOTIABLE INSTRUMENT.—There is one case where the law allows a party who has a right to surrender it without consideration. This is by virtue of the Negotiable Instruments Law, which provides that the holder of a note may discharge any party to it by a written renunciation of

his claim. No particular form of words is necessary, but the renunciation must be in writing. No consideration is necessary.

103. ALTERATION OF WRITTEN CONTRACTS.—The alteration of a written contract in a material particular with fraudulent intent by a promisee in effect discharges the contract so far as he is concerned. He can not enforce it either in its original form or its altered form, though the other party to the contract may enforce it against him. If the alteration is not material, the contract may be enforced even by the party who altered it whatever the motive of the alteration may have been. If the alteration is material but not fraudulently intended, that party is generally allowed to enforce the contract in its original form. No alteration by a third person affects the rights of a party to a contract. By material alteration is meant one which if given effect would alter the legal obligations of the parties to the contract. The rule of the Negotiable Instruments Law in regard to alteration of negotiable instruments, it should be observed, is somewhat more severe than that generally prevailing in regard to other contracts.

CHAPTER VI

Agency

104. WHO IS AN AGENT?—The law of agency, as between principal and agent, is simply an application of the general law of contracts, but as between third parties and the principal, or agent, there are new questions. The first question is, who is an agent and who is a principal? Any employer is a principal and any employee is an agent. The employer is a principal whether he employs the employee for a single act or whether he employs him for a period of time. Besides the ordinary cases that you will think of under the head of employer and employee, an officer of a corporation is an agent, the corporation being the principal. The president of a corporation is as much an agent as a clerk in the employ of the corporation. A partner is an agent, an agent of the firm. These different kinds of agents are distinguished chiefly in the different scope of the authority which they possess.

105. RIGHT OF PRINCIPAL TO DILIGENT AND SKILLFUL SERVICE.—Let us consider, first, the rights of the principal and agent as between one another. The rights which the principal has against the agent are, first, a right to have the employee render reasonably diligent and skillful service. The amount of skill which the employer can fairly demand from his agent depends on the

character of the contract between the two and on the circumstances justifying the principal in expecting a greater or less degree of skill. When a man employs an expert accountant to act for him he has a right to expect greater skill than if he were employing an ordinary bookkeeper. It depends on the character of the work and of the man employed. The amount of compensation may also have a bearing on the amount of skill the employer has a right to expect.

106. RIGHT OF PRINCIPAL THAT AGENT SHALL NOT EXCEED HIS AUTHORITY.—The second right that a principal has is to demand from his agent that the agent shall act in obedience to instructions and only within the limits of his authority. These limits may be fixed expressly in the contract between principal and agent, or they may be left wholly to implication from the nature of the employment. Perhaps more commonly they are partly fixed by express agreement and partly fixed by natural implications which arise from the nature of the employment.

107. RIGHT OF PRINCIPAL TO ACCOUNTING.—Thirdly, the principal has a right in financial dealings with his agent, or in regard to financial dealings of the agent with third persons, to demand an account from his agent. It is not enough that the agent actually expend money intrusted to him correctly; he must furnish a correct account of expenses and of collections.

108. RIGHT OF PRINCIPAL TO FIDELITY.—Finally, the agent is under a duty of fidelity or loyalty to his principal. The principal is entitled to demand that the agent, unless the contrary is agreed, shall make the employment or agency, his sole interest in regard to that particular thing. Of course, in many agencies the agent is undertaking a great deal of outside business besides the particular agency in question, and he has a right to do it so long as the principal has not engaged his whole time, and so long as one agency does not interfere with another. But that last is an important point. An agent who undertakes one task for one principal which occupies only one-tenth of his time cannot take another employment which is inconsistent with that. An agent to sell a particular kind of goods for one principal, even though this agency is not expected to take the agent's whole time, cannot undertake an agency for a competing principal. The two things are inconsistent and the agent would be disloyal to his employer if he accepted the inconsistent employment.

109. SIDE COMPENSATION.—Then, again, the agent must not get what may be called "side compensation" of any sort. His whole compensation as agent must be what is due him directly from the principal under the agreement. For instance, if a buyer for a department store gets paid a commission by a firm from whom he buys goods, that is a side commission which the buyer as an agent has

no right to take; and so strict is the law, that if an agent does take any such extra compensation the principal has a right to recover it from him. Of course, if the principal agrees to side compensation, it is all right for the agent to take it; when the principal agrees to it, it ceases to be what we have called side compensation and becomes part of the agent's direct compensation to which he is entitled under his bargain with his principal.

110. ACTING AS AGENT FOR BOTH PARTIES.—One of the most common difficulties that agents get into in regard to this requirement of fidelity, and sometimes with entirely good faith, is by undertaking to act as agent for both parties. That cannot be done unless each party especially agrees that the agent may act for the adverse party. An attorney-at-law cannot represent two sides of a case. A real estate broker cannot represent buyer and seller, and a stock broker cannot represent buyer and seller. Stock brokers have one practice which perhaps may seem to infringe this rule. A customer comes into a broker's office and says he wants to buy 100 shares of New York Central. About the same time another customer comes in and says he wants to sell 100 shares of New York Central. Now, must a broker go on the exchange and make one purchase for one customer, and then a sale for the other, or may he, so to speak, negotiate through himself a sale for the customer who wants to buy from the one who wants to sell? What

he frequently does, in fact, is this: He buys and sells from himself, but publicly, giving other brokers the chance to buy or sell if they wish. The broker, according to the rules of the New York Stock Exchange, cannot execute this transaction secretly in his office, but must offer the securities in question on the exchange, and the purchase and sale must be recorded on the ticker. If the bidding and asking prices are more than an eighth apart, he may offer the New York Central at a price midway between the bidding and asking quotations and buy it himself and charge each customer a commission, but he must actually make the offer or bid aloud on the floor. The broker is technically acting for both parties, but he is not fixing the price. He makes an open bid on the exchange, and it may be that would save the transaction.

111. AGENT'S RIGHT TO COMPENSATION.—What are the rights of the agent against the principal? They are two. First, a right to compensation; that is, a right to the pay that has been agreed upon, or, if no pay was agreed upon but it was understood that there should be some compensation, then a right to reasonable compensation. It is perfectly possible to have an agency without compensation. Frequently one man agrees to act for another without pay, and an agent who is acting without compensation, so long as he acts as agent, is bound to the same obligations to his principal as if he were receiving compensation, only he can

withdraw from his agency whenever he sees fit since he is not paid for it. But unless circumstances show that an agency was understood to be without compensation, it would be implied that reasonable compensation was to be paid.

112. AGENT'S RIGHT TO REIMBURSEMENT.—The other right of the agent is the right to reimbursement and indemnity. As the agent is acting for the principal, the principal ought to pay all the bills of whatever kind incurred, so long as the agent is acting rightfully within his authority, and the principal is bound to pay all such bills. This obligation of the principal to pay all the bills of the agency means not simply that he must pay actual expenses, but that if liabilities of any kind arise by reason of third persons suing the agent or holding him liable, if the action of the agent was within his authority, the principal must indemnify against any loss.

113. PRINCIPAL BOUND TO THIRD PERSONS BY AUTHORIZED ACTS OF AGENT.—Now let us turn from the rights of principal and agent as between one another to the rights of third persons. When do third persons get rights against the principal? In the first place, whenever the agent, acting in accordance with his authority, enters into a transaction with a third person on behalf of the principal, the principal is bound to the third person to just the same extent as if he himself had entered into the transaction; but it is not only cases where

express authority is given to the agent that this principle applies.

114. IMPLIED AUTHORITY OF AGENT.—In many cases the authority given an agent is not expressly stated. One has to rely on the general course of business and on the nature of the employment to determine the extent of the agent's authority. A third person deals with a cashier of a bank, or deals with the paying teller, or he deals with the president; now whether the bank is bound by that dealing depends on what is by general custom or course of business the authority of a cashier or a paying teller or a president. If cashiers or paying tellers or presidents generally have certain authority, then it is a fair assumption that this particular officer has such authority.

115. AUTHORITY TO DO PARTICULAR ACTS.—An agent to sell has generally no authority to make a sale on credit or to receive anything but money; he cannot barter or exchange the property even in part, nor pledge or dispose of the property to be sold in payment of his own debts. For the sale of land an agent's authority ought always to be under seal, and the provisions contained in this power of attorney will be strictly construed. In a sale of personal property, an agent has implied authority to do whatever is usual and necessary in such transactions. He may receive payment if he has possession of the goods, but not otherwise, and warrant the quality, if such goods are customarily

sold with a warranty by agents. He cannot sell on credit unless such is the custom, as in the case of commission merchants, nor pledge or mortgage the goods. The agent may not buy on credit unless so authorized, or it is the custom of the trade; but a principal's direction to purchase, without supplying the agent with funds, will imply authority to purchase on credit. The agent must purchase precisely as directed. An agent to manage has an authority co-extensive in scope with the business, and possesses the same power and authority as the principal, so far as management goes, but the agent may not sell or dispose of a business, nor mortgage the property used in carrying it on, nor engage in new and different enterprises. Public agents, i. e., public officers, cannot involve their principals, the municipal corporations whose officers they are, in contract liabilities with third parties unless actually authorized to do the act in question; and all persons dealing with them must inform themselves of the scope of their legal powers.

116. APPARENT AUTHORITY OF AGENT. —But it is not only in cases where the agent is expressly authorized, or authorized by such implication as we have just alluded to, that the principal is bound. There is the further case where the agent has apparent authority, although, as a matter of fact, he has no authority. Take the case of a cashier certifying a check. We will suppose that cashiers generally have authority to certify checks. With

most cashiers that would be what we have called an implied authority, as it arises from the general nature of their positions though nothing was ever said about it by the bank directors. But suppose in a particular bank it was a rule of the bank, expressly stated and voted by the directors, that the cashier should not have power to certify checks. Now, no one can say that his power here is either express or implied; it is certainly not express, and any implication that might otherwise arise from his position is negatived by the express vote of the directors, and yet if that cashier should certify a check to any person ignorant of this limitation on his authority the bank would be bound by the certification because the cashier has apparent authority. He looks to the world as if he had authority, and seems to the public like any other cashier. Most of the difficult cases in agency, so far as liability of the principal to third persons is concerned, relate to this matter of apparent authority.

117. ILLUSTRATIONS.—Compare this case with the case of the cashier above alluded to: A man who is giving some support financially to a book dealer writes a note in which he says, "I authorize A. B. to buy a stock of books not exceeding, at any one time, $5,000." The book dealer shows that written authority to persons from whom he wishes to buy books. They sell him books, and, unknown to the last person who thus sells him books, he has just before bought a quantity which makes the total

largely exceed $5,000. Is the principal liable to the persons who sold books last to the dealer? The answer is no. And what is the difference between that case and the cashier case? In the book case the last seller saw the paper giving authority to the book dealer to purchase. He had no reason to know that the day before a large quantity of books had been purchased. He acted in entire good faith and the deception was natural. Still, the employer, or the writer of the letter, has done nothing here to make the last seller suppose that $5,000 worth of books had not already been bought, nor does the course of business justify the last seller in supposing they might not already have been bought. It was a hard question for him to find out, but on the face of the letter it was evident that any one who dealt with the bookseller might have to determine this question or rely at his peril on the bookseller's word. Here is another case: a town treasurer was authorized to borrow a certain sum of money. He gets a certified copy of the vote and goes to one bank and borrows the money, and goes to another bank with that same certified copy of the note and borrows the money over again. Is the town liable to the second bank? No; on the face of the paper there was but one loan to the town authorized, and any one who lends the money must at his peril find out whether a loan has already been made. When we say, therefore, that a principal is bound if his agent had apparent authority, we do not mean that

whenever a third person is deceived into the belief that the agent has authority the principal is bound. Quite the contrary, the principal must have in some way been the cause of that deception; he must have caused it either by some express representations, or he must have caused it by putting a man in a place where the general course of business would induce the public to believe the agent had greater powers than he had.

118. GENERAL AND SPECIAL AGENTS.— It is much easier to find a case of apparent authority which will bind the principal if the agent is a general agent than if he is a special agent. A special agent is an agent authorized to do one act, as this town treasurer was authorized to make one loan. The cashier is a general agent, authorized to do any of the great variety of acts which cashiers ordinarily do, and if the directors vote to take away one of the normal powers of the cashier they have got to make the limitation public or the bank will be bound by the cashier's act.

119. UNDISCLOSED PRINCIPAL. — Not only may the third person hold the principal liable in cases where the agent purports to act for the principal, but also in cases where the agent does not disclose his principal at all and purports to act as a principal himself, so long as it is true that the agent really was acting in the principal's business. Suppose a selling agent for a manufactory enters into a contract for the

sale of goods produced in the manufactory. The selling agent, we will further suppose, does as selling agents often do—contracts in his own name; but he contracts in regard to the sale of the product of the principal, the manufacturer, and on his behalf. Now, assume that this contract of the sales agent was authorized; the third person may sue the manufacturing company, though he did not know of the existence of the manufactory at the time he entered into the contract, and supposed he was contracting simply with the agent. As it is phrased in law, an undisclosed principal is liable, and conversely, the undisclosed principal may sue on this contract made by the sales agent.

120. RATIFICATION.—If an agent act beyond his authority, the principal, if he chooses, may ratify the acts of the agent. Occasionally in an emergency it becomes necessary for an agent who has his principal's interest at heart to take a chance and act beyond the authority given him. In such a case, if the principal ratifies it, it is all right, both as far as the agent is concerned, and as far as the third person is concerned; but, of course, the principal is under no legal obligation to ratify.

121. RIGHTS OF PRINCIPAL AGAINST THIRD PERSONS.—Now, the right of the principal against the third person is the converse of the right of the third person against the principal, which we have been speaking of. Generally when a transaction is of such a sort that the third person would

have a right of action against the principal, if the principal fails to do as he agreed, the principal will have a right of action against the third person if the latter breaks his agreement.

122. PRINCIPAL IS LIABLE FOR TORTS OF AGENT.—Not only is the principal liable for the contracts of his agent, but he is also liable for any tort which an agent may commit, so long as he is acting in the course of his business. Of course, accident cases present the commonest type of that sort of liability. A street railway is liable for the results of its motorman's neglect, so long as the motorman was running the car. If the motorman got off the car on a frolic of his own, the street railway would not be liable for anything he might do then. The same principle may be found in other cases than accident cases. Suppose officers of a corporation wrongfully overissue stock. If those officers were the officers authorized to issue stock; if, therefore, they were acting in the general course of their business, the corporation would be liable for that tortious act in overissuing stock.

123. AUTHORITY MAY GENERALLY BE ORAL AS WELL AS WRITTEN.—The authority given by a principal to an agent may in general be oral as well as written; it is just as good. There are, however, a few exceptions to that. In the first place, an authority given to an agent to execute an instrument under seal must itself be not only written but under seal. An oral or a written authority

if not under seal, given to an agent to convey land which must be conveyed by a sealed deed, would not enable the agent to make a valid deed. Where the effect of seals is abolished this principle is of course no longer applicable. Generally an agent orally authorized to make a contract to buy or sell land may bind his principal by entering into such a contract. The contract the agent enters into must, because of the Statute of Frauds, be in writing, and signed, but the agent's authority generally need not be written. In some States, however, written authority is required by statutes.

124. POWERS OF ATTORNEY.—A power of attorney must oftentimes be given in order to convince third persons that the agent really is an agent, with the powers which he claims to possess. A power of attorney is nothing more than a written statement that a particular person is the agent of another person, with the powers stated in the document. A power of attorney may be very broad, giving the agent very wide powers, or it may be narrow, giving the agent or attorney power to do only a specific thing. Now, many powers, so far as the law itself is concerned, might just as well be oral as written, but you could not induce third parties to deal with the agent and believe that he had authority unless he showed as proof of it a power of attorney. That is why a power of attorney is generally given; not that the law requires it, but that the agent may have evidence of his agency

which will satisfy third persons that he is really the agent. A corporation would not transfer stock without a written power presented to it; yet, if it chooses to run the risk, there would be nothing illegal in doing so. But it does not choose, and an attempt to compel it to transfer would be held unreasonable unless the authority of the person claiming to be empowered to transfer the stock were in writing and shown to it.

125. WITNESSED AND SEALED POWERS OF ATTORNEY.—A witness is not necessary on a power of attorney. A witness on a power of attorney has the same effect as on any other document where a witness is not absolutely required, and that is this: if the signature of a document is called in question and the signature is witnessed, the way which the law requires proof of the signature is by calling the witness to testify, and no other evidence is permissible until the witness is produced or his absence accounted for; that is, some adequate reason given and proved for not producing the particular man who witnessed the signature. For this very reason it is sometimes more difficult to prove a signature which is witnessed than one which is not. A signature which is not witnessed may be proved by anybody who has seen the person sign, or who is familiar with his signature, and who can testify that the signature in question is his. The object of a witness is to provide certain evidence that a signature is genuine. The testimony of a witness

may be more convincing in case of a dispute than testimony of one who merely recognizes the signer's handwriting. A witnessed power of attorney might be, however, more difficult to prove if the power of attorney were contested than if it was not witnessed, that is, if the witness could not be found. On the other hand, if you had your witness within reach it would be easy to prove the signature by him. The whole matter of witnesses to deeds and other documents, where a witness is not absolutely required, may be thus summarized: it is a good thing to have a witness if the witness is a reliable, well-known person who can always or generally be reached. It is a bad thing to have a witness who is a servant or a person whom you may lose sight of after some time has elapsed. The question may also be asked: How does a power of attorney, when given under seal, compare with one without a seal? One is as good as the other, except that if it is desired that the attorney or agent shall execute any instrument under seal, such as a deed of real estate, the power must itself be under seal; but a power to do anything which does not require the execution of a sealed instrument is just as good without a seal as with one. This, however, is true: if the power contains an agreement by the principal not to revoke the power, this agreement will not be binding if there is neither seal nor consideration, but will be binding without consideration if under seal, in a State where seals still have their common law effect.

The principal will be able, it is true, even in such a case, to revoke the power, but he will commit a breach of contract if he does.

126. PROXIES.—So a proxy is simply a written power of attorney to an agent, authorizing him to vote for a stockholder, and there, too, a corporation would be held justified in refusing to recognize any proxy that was not in writing, or any agent who did not have a written proxy even though proxies were not required to be in writing.

127. LIABILITY OF AGENT TO THIRD PERSONS.—How about the rights and duties of the agent as against the outside world? The agent is liable to a third person if he commits a tort. It does not make any difference that the principal is also liable, the agent is liable too. The third person may sue either the principal or agent as he prefers; he cannot get compensation for his injury more than once, but he can get that either from the principal or agent, whichever is more convenient. The third person may hold the agent liable if the agent contracts for an undisclosed principal. In the case of the sales agent referred to a moment ago, where the sales agent was really acting as agent for a manufactory but did not say so, the third person might sue the manufacturer on the contract; but he might sue the agent, and if the agent was held liable he would have to seek reimbursement from the principal.

128. AGENT WARRANTS HIS AUTHORITY.—An agent is liable in one other case to the third person with whom he deals. If the agent did not have authority to do what he purported to do the third person can sue him, though the third person could not sue the principal in this case, since the agent was exceeding his authority. An agent is said to warrant his authority to persons with whom he deals.

129. RIGHTS OF AGENT AGAINST THIRD PERSONS.—The agent himself does not generally care to assert any rights against third persons, and it is only in the case of the undisclosed principal, where the agent purports to contract on his own behalf, that an agent has any rights against third persons. In general, the agent is satisfied to be merely the hand of the principal; to have the rights and liability belong to the principal; and himself to seek shelter under the principal.

130. AGENT CANNOT DELEGATE AUTHORITY.—An important rule in agency is that an agent cannot delegate his authority. If A is appointed to do certain work, A must do it himself, and cannot empower B to do it if it proves inconvenient to do it himself. There are three exceptions to this rule. The first is that if he is given express permission to delegate his authority, he may do so, and, of course, if the principal should ratify an unpermitted delegation of authority, the ratification would here, as always, serve as well as original au-

thority. The second case is where the usage of business is such that the principal must be presumed to have understood that there was to be a delegation, or partial delegation, of authority, and in such a case, though the principal has not expressly authorized delegation, he will be treated as if he had authorized it by virtue of business usage. The third case where delegation is authorized is in regard to what are called ministerial or mechanical acts, that is, acts which involve no exercise of judgment or skill. The principal is entitled to the agent's judgment and skill, but if there are parts of the work that do not require skill and that, from their nature, any ordinary clerical assistant can do, then such acts may be delegated.

131. TERMINATION OF AGENCY BY ACT OF PARTIES.—The parties may have agreed in their contract that it should terminate at a certain time or on the happening of a certain event. The arrival of that time or the happening of the event would of course end the relation as between them. It would not so operate as between principal and third parties, however, unless the third parties were informed. So, performance of the purpose for which the relation was created terminates the relation as between principal and agent. The parties may make a subsequent agreement to terminate the relation, and such an agreement would be good, the abandonment of the rights of each party created by the original contract being a sufficient considera-

tion for the promise of each to surrender his own rights.

132. REVOCATION.—Except in the case of irrevocable agency noted below, the principal may revoke at any time the agent's authority as to matters not already executed. Any other rule would enslave the principal to his agent by forcing him, at the agent's will, and against his own consent, into contracts with third parties. But, while the principal has this right, the exercise of it may subject him to liability to his agent. If the contract of employment is for a definite time, and the principal, without cause, revokes the agent's authority before that time arrives, the principal is liable to the agent for breach of contract; if no time is fixed for the termination of the agency, it is an agency at will, and the principal, with or without cause, may revoke at any time without incurring liability to his agent. The acts which will amount to a revocation by the principal are various. For instance, if an agent has exclusive authority to represent the principal, the appointment of another agent would amount to a revocation. As to making the revocation effective, a revocation operates on the agent from the time he has notice of it. It is effective as to third parties only when notice is given to those who have dealt with the agent that the agent's authority is revoked. Without such notice the principal does not escape liability to third parties by reason of further acts on his agent's part. Where an agent is appointed in a

particular business, parties dealing with him in that business have a right to rely upon the continuance of his authority until in some way informed of its revocation. This notice must be actual to those who have dealt with the agent, and general, as by publication in newspapers, where persons have not before dealt with the agent.

133. RENUNCIATION.—The agent may renounce his employment at any time, but if he contracted to serve for a certain time, and renounce before that time arrives, he is liable to the principal for breach of contract, unless he has ground for renunciation, such as the principal's breach of faith with him. The sickness of the agent is a ground for renouncing the relation, even though the sickness be caused by his own negligence or wrong. The principal should inform third parties of the agent's renunciation if he would fully protect himself against further acts of the agent.

134. TERMINATION OF AGENCY BY OPERATION OF LAW.—As in the case of ordinary contracts, a contract of agency may be terminated by the rules of law upon the happening of certain events. Thus, the destruction of the subject-matter of the agency terminates the relation, if the parties contemplated the continued existence of the subject-matter as the foundation for what was to be done. A change in the law, as the enactment of a statute declaring illegal agencies of a certain nature that previously had been legal, terminates the

relation. So also certain changes affecting the parties to the relation—i. e., the principal or the agent—effect a termination. The death of the principal brings the relation to an end, and this is so although the agent had no notice of it and subsequently dealt on behalf of his principal with third parties; such contracts do not bind the principal's estate. The death of the agent necessarily ends the relation. The occurrence of the principal's insanity terminates the relation, and a judicial finding of insanity is notice to all; but without notice of the insanity third persons who deal with the agent in good faith are protected. The bankruptcy of the principal terminates the relation as to all matters affected by the bankruptcy. Impossibility to continue the relation brought about by restraint of law terminates the relation.

135. IRREVOCABLE AGENCIES.—An agency to do an act touching a thing in which the agent has an interest, or in which he is subject to an obligation, cannot be terminated by act of the principal alone. The principal cannot terminate the relation so as to leave the agent under obligations to third parties, thereby shifting his obligations upon the agent; nor can he when the agent has an interest in the subject-matter of the agency. It is difficult to state concisely what will constitute such an interest that the principal cannot terminate the relation, but it may be said to be some ownership or right in the matter dealt with, such that the agent may deal

with it in his own name, not a mere benefit to be obtained from the performance of the contract of agency, as a commission to be realized from sales. Possession of personal property with the right to sell, with authority to apply the proceeds to a debt due from the principal to the agent, is sometimes held to constitute an agency coupled with an interest such that the principal may not revoke it; on the other hand, an interest arising from commissions or the proceeds of a transaction, is not an interest which will prevent revocation. The courts carefully examine agencies claimed to be irrevocable because coupled with an interest, and incline to rule against them.

CHAPTER VII

Partners, Trustees and Executors

136. RELATIONS ANALOGOUS TO PRINCIPAL AND AGENT.—There are a few relations which are somewhat analogous to that between principal and agent, and to which reference must be made. One is the relation of partners to the partnership and to the outside world. Then there are trustees, executors and administrators.

137. PARTNERSHIPS.—In regard to partnerships, the first question is, what is a partnership? It is based on an agreement to carry on a common business for a profit. Sometimes the outside world has a right to suppose persons are partners though they really are not. Such persons are called partners by estoppel; that means there is no real partnership, but third persons have justifiably been induced to believe by certain persons that they were in partnership, and therefore may treat them as if they were.

138. ARTICLES OF PARTNERSHIP.—We have seen in the foregoing section that parties need not expressly declare themselves partners, or enter into an express contract, in order to become partners. So the framing of written partnership articles—a written contract of partnership—is not essential, though it is the ordinary and advisable course. We may note here a few rules governing

the use and construction of such articles where they have been adopted. They should, of course, provide for as many contingencies as can be foreseen, such as the nature, name and place of business, when the relation is to commence and when to terminate, what capital shall be contributed by each, what the share of each in the profits and losses shall be, what the powers of the partners as between themselves shall be, whether the business shall be continued after the death of one or more of the partners and how it shall be wound up. But the important thing to note is, that if provision be not made, the general law, and particularly that part governing the powers and duties of partners to each other and to third persons, applies. In other words, the partners may by their contract determine what their rights as between themselves shall be, but if they do not, the rules of law will determine them. Thus they may determine that of two partners one shall have two-thirds and the other one-third of the profits; in the absence of such a clause the law determines the profits shall be divided equally. When articles have been once adopted they can only be changed by the consent of all the partners, but this consent need not be formally expressed in words, it may be implied from a long-continued course of conduct. The law provides no means to force a partner to live up to his contract except in a very few cases; the most it gives is a

right of action for the breach caused by his failure to do as agreed.

139. FIRM NAME.—The adoption of a firm name is not an essential to a partnership, but is customary and advisable. The names of the partners may be combined, or a single name used, or a fictitious name, or any name, so long as the rights of other persons are not violated. In some States, notably New York, the use of the name of a person not a partner is forbidden, as is also the use of the expression "& Co.," unless a partner is represented by it. Ordinarily, contracts may be made in the firm name and by one partner, but contracts under seal should be made in the names of the partners "doing business as," etc., and cannot be made by one partner without authority from the others. Conveyances of real property should be made to or by the individual partners "doing business as," etc., for the law does not generally recognize the firm as a separate person or entity sufficiently to enable it as such to take or give a conveyance. If the deed ran to "John Doe & Co.," the title would be in John Doe only, though he would be said to hold it in trust for the firm, for if the partnership name is given as the grantee, the title goes only to those whose names appear, and if the partnership were doing business under a fictitious name, the deed would convey nothing. Whether land, the title to which is in the name of one partner, is held in trust by him as partnership property, is a question of in-

tention, and that question is determined by asking with what money was the land bought, what use has it been put to, has it been carried on the books of the firm, with what money have the taxes, insurance, and other charges been paid, etc. If found to have been treated as partnership property, the fact that the title is in one person counts for little, as he will be said to hold it in trust for the firm, but the careful business man will avoid trouble by having the property conveyed to the firm in the manner indicated if it is actually partnership property.

140. POWERS OF A PARTNER.—What are the powers of a partner? He is, as stated, a sort of agent, and the question in his case is like the question in the case of any other agent. What express powers are given to him, and what implied powers may he be supposed to possess in the absence of express powers? The scope of the business carried on by the firm is the principal element which enables us to determine what powers are implied and what powers the public has a right to assume a particular partner possesses. Has he a power to sell? A power to sell real estate would not generally be implied in favor of a single partner, but to sell personal property in line with the business of the firm is, of course, a very common power. A power to incur obligations, as by borrowing or buying on credit, again would depend on the scope of the business of the firm, and the power to issue nego-

tiable paper in the same way. A distinction is drawn between trading and non-trading partnerships. A law partnership, though organized for profit, is not organized for trade, and therefore there would be no implied authority to borrow or to issue bills or notes. There might be authority to buy on credit such articles as were appropriate to the business of the firm, as law books or stationery. The power to hire employees would generally be implied.

141. POWERS OF A MAJORITY OF PARTNERS.—If partners disagree, then a majority of them have power to decide what shall be done; but there are limits even to the power of a majority. They can only carry on the business of the firm, and any vote of the majority, or action of the majority, to change the character of the business for which the firm was organized, or to make any fundamental change in the original articles of the partnership, would be invalid.

142. OWNERSHIP OF FIRM PROPERTY AND CREDITORS' RIGHTS.—The firm property is owned by all the partners jointly, but the interest of each individual partner is not an interest in each piece of firm property, but a right to have an accounting and to receive on the accounting such share of the assets as belong to him when all debts due from him to the firm and all liabilities to the outside world are settled. Consequently, a creditor of an individual partner cannot seize or attach or levy on firm property, because that firm property

does not belong, nor does any part of it belong, to his debtor. The creditor must file a bill in equity asking that the partner's share be determined, and that on an accounting so much as is found due to the debtor partner be applied to discharge that partner's indebtedness.

143. DISSOLUTION OF PARTNERSHIP. —Partnerships are dissolved like agencies—by the death of a partner, also by bankruptcy. Like an agency, a partnership is dissolved by the expiration of the term for which it was originally created. Unlike an agency, however, a partnership cannot be dissolved sooner than the term for which it was created without the assent of the partners. The misconduct of a partner, or the fact that a business has proved to be a losing business, or any other just cause, may authorize a court, on petition of a partner, to dissolve the partnership; but one partner by himself cannot do it. When a partnership is dissolved it is common for the business to require liquidation, and frequently one or more of the partners are what are called liquidating partners. If a partnership is dissolved by death, for instance, the surviving partners have a right to be liquidating partners and liquidate the business. That means they may carry on existing contracts; they may dispose of the stock on hand to the best advantage. If this requires incidental purchases of new goods, they may be made, but in general new business cannot be undertaken. The function of a liquidat-

ing partner is to satisfy existing contracts, reduce the property of the firm to cash, and then distribute it to those who are entitled to receive it.

144. LIMITED PARTNERSHIP.—Statutes in many States permit the formation of limited partnerships, the object of which is to enable one or more partners to avoid unlimited liability for debts. Partners in a general partnership are each liable, individually, for the full amount of the firm's indebtedness. If one partner is thus compelled to pay up more than his share he has got to seek redress by demanding contribution from his fellow partners, and if they are not solvent he will not get paid in full. If there is one solvent partner, for instance, and two other partners, both of whom become insolvent, the result will be that the first partner will have to pay the debts of the firm and will have no redress except such as he may be able to get from the insolvent estates of his two partners. Now, in a limited partnership a limited partner does not stand to lose any more than the money he puts into the firm. In order to create a limited partnership it is necessary to sign a certificate prepared for the purpose and stating the facts, file it in the office of the Secretary of State or other official, and also publish it so that the public may be informed of the circumstances and credit may not be given by the world at large to the firm on the assumption that the limited partner is a general partner. He puts a specified amount of money into the firm and that money may

be reached by creditors of the firm, but they cannot hold him further liable.

A silent partner must not be confused with a limited partner. A silent partner is a general partner who takes no part in the active management of the business and frequently is a secret partner. A limited partner can never be a secret partner, since the terms of a limited partnership must be published. A limited partner should take no part in the management of the business, or he may render himself liable as a general partner. The limited partnership law requires, moreover, that he must have exactly complied with the law by making out, filing and publishing a certificate.

We often see also in print, so and so "Ltd." This does not mean a limited partnership. The word "limited" is used in the name of an English or Canadian company organized under the English or Canadian statutes, but such companies are rather analogous to corporations than to limited partnerships. The liability in such companies is limited altogether to the assets in the company's hands. There are no general partners. The liability of all stockholders is limited. The English and Canadian law requires that the word Limited be added to the name, so that the public may not be deceived into believing that the company is a partnership.

145. TRUSTEES, EXECUTORS, ADMINISTRATORS.—Trustees, executors and administrators may be classed together because they are all

alike in that they hold legal title to property which is held by them for the benefit of other persons. They hold the legal title. A trustee is the owner of the property, and any one who seeks a transfer of the legal title of the property must get it from the trustee. Executors have exactly the same powers as administrators, aside from powers that may be expressly given in a will. The difference in name is simply because an executor is appointed by the will of the testator, whereas an administrator is appointed by the court to take charge of an estate for which no executor has been named in a testator's will, or where the executor may have died or refused to act.

146. THEIR APPOINTMENT.—Were it not for statutes, a trustee or an executor would become such simply because somebody had made him a trustee or an executor without any appointment or assistance from the court. But in the appointment of executors or trustees under wills the court is by statute generally required to make an appointment to give validity to a nomination or appointment in the testator's will. Administrators, of course, from their very nature, have to be appointed by the court. A trust, however, may be created between living persons without any appointment by the court, and frequently is. A real estate trust may be created by simply conveying property to trustees on the trust that they manage it and pay the income to the beneficiaries, and a great variety of trusts are constantly

created without an appointment from the court. Wherever any question on a trust arises, or wherever the appointment of a new trustee is necessary, however, the court has jurisdiction, and any person interested in the trust can bring the matter before the court. When a testator dies the person named as executor in the will petitions for appointment, and unless there is some reason why he should not be appointed he doubtless will be appointed. If there is no executor, then the persons, or beneficiaries, interested in the estate, usually agree on whom they will assent to have administer the estate, and a petition is filed for his appointment. The person who is next of kin and competent to act is generally appointed in the absence of agreement. These officers remain in office and retain their powers until their work is completed, unless they are sooner removed, which they may be at any time for cause.

147. THEIR POWERS.—What powers do these persons have? Do they have power to sell? We must first always look at the terms of the trust. If we are dealing with a trustee under a will we look at the will to see what powers the testator gave him. If we are looking at a question of a trust under deed we look at the deed, and the right of an executor to sell real estate similarly depends on whether any such power has been given him in the will. Aside from express power given in the instrument a trustee has no power to sell either real

or personal property unless the power is expressly given or unless the nature of the trust is such as necessarily implies the power, and courts are very slow in making that implication of power. An executor, on the other hand, since his duty is to reduce the personal property of an estate to cash and distribute it, has, in most States, implied power to sell personal property. He has, however, no power to sell real estate unless the will expressly gave such power. The court may authorize him to sell real estate, and will authorize him, if it is necessary to pay debts or legacies, but only in such cases unless a power is expressly given. Trustees, executors and administrators have no power to pledge property unless expressly given in the instrument under which they act. They have power to make such contracts as are necessary to carry out their trust, but only these, and even when they make such contracts they are personally liable upon them, having, however, a right of reimbursement from the estate which they represent. If they entered into an unauthorized contract they would be liable upon it personally and have no right of reimbursement.

148. THEIR DUTIES.—Their first duty is the care and custody of the property in their charge. A trustee, whose duty is to hold property, is bound to keep it invested so as to bring in an income, whereas an executor has no right to invest property; if he does so he will take the chance of loss, and the beneficiary can not only hold him liable for loss

but can also take the profit should the investment prove profitable. The executor's duty is to reduce the property to cash and distribute it to the proper parties. All these officers owe the same duty of fidelity to their beneficiary that an agent owes to his principal. There is the same duty to execute the trust personally and not delegate authority, except in regard to ministerial or mechanical acts. There is the same duty to account, and, furthermore, the accounts of these officers, if they are appointed by the court, must be filed in court. The trustee to carry out his trust will ordinarily distribute the income to the persons entitled, but, of course, trusts are of great variety, and not infrequently the object of a trust is to accumulate the income. Whatever the terms of the trust are they must be carried out. The duties of the executor and administrator are to distribute the estate by paying creditors first and the surplus to legatees or the next of kin legally entitled. They are allowed a fixed period, in many States two years, to settle an estate.

One of the most essential duties of any fiduciary is to keep the property he holds as a fiduciary separate and distinct from his own. This means that a trustee or executor receiving current income must keep a separate bank account as trustee or executor, and of course he should not draw checks on that fund for personal debts. A question that not infrequently arises is this. A trustee has issued his check signed as trustee for his personal use.

May the estate sue the person for accepting trust funds in payment for such personal debt? The courts have gone pretty far in regard to banks, at least in allowing them to suppose that possibly a righteous expenditure of the funds is being made. The supposition is possible that the trustee was entitled to this money from the trust funds, either as a trustee's commission or otherwise. In that event a check signed by him as a trustee payable to himself would be proper; and although it would not be a good way of doing business for him to draw a trustee check for what was due him personally, made payable to a third person, yet it would not be fraudulent if he was really entitled to that amount from the trust.

CHAPTER VIII

Corporations

149. NATURE OF CORPORATIONS.—A corporation is a fictitious person created wholly by the State under authority of law, and has power to do certain acts wholly apart from the individual members or stockholders. As an illustration, a corporation owns its own property and performs its own business as would an individual. In this, as well as in other respects, it is very different from a partnership. Corporations are of various kinds, among which may be mentioned those formed wholly for the purpose of charitable work, or for religious or social purposes, and other special forms allowed by the statutes of the various States. We, however, are concerned with business corporations, membership in which is determined by the ownership of stock. It may be stated at the outset, that the directors of such corporations have the power of management and except where the statutes provide otherwise, they act independently of the stockholders. One other important feature of a corporation is that it alone is liable for its debts, and a stockholder has no liability for corporate debts, except such as is expressly imposed by the statutes of the various States, beyond liability for any amount unpaid upon his stock. Therefore, if the stock was fully paid for, the stockholder has usually no lia-

bility. As an illustration of this let us assume that A, B and C were partners. They would be individually liable for all firm debts, and in many cases, one or more of them could be held personally liable for debts contracted on behalf of the firm by any one of them without authority and even though the firm was not benefited. Let us now assume that A, B and C formed themselves into a corporation. A result of this would be to place the ownership of all corporate property in the corporation alone, and also that A, B and C would have no individual liability whatever for corporate debts except such as might be imposed by the statute of the State wherein the corporation was formed. In banking corporations, however, stockholders are generally subject to liability for an amount equal to the par of their shares, over and above their liability which exists if the shares are not full paid.

150. POWERS OF CORPORATIONS.—A corporation is unable to do anything beyond such powers as are granted it by law. As to the extent of the powers possessed by a corporation, we may conveniently divide corporate powers into those which are express and those which are implied. Express powers may be considered as including those which are mentioned in the official document used or granted upon the beginning of the existence of the corporation. These official documents are spoken of as "charters" or "certificates of incorporation." Whatever term may be applied to them

there is generally in such document a statement of the general purposes or objects for which the corporation is formed; in other words, of the general business in which it is to engage. There is also a statement of the general powers of the corporation to engage in the business mentioned. The powers so mentioned in such official document may be termed, as we have stated, express powers of the corporation. Needless to say, however, it is not usual or possible to attempt to indicate in any such official document all the details of the operations of business. Therefore, it is necessary to imply that in addition to such express powers the corporation has power to do such acts as may be reasonably necessary or incidental to the carrying on of the business mentioned or the express powers. Powers so implied without words are termed "implied powers." Therefore, the total powers of a corporation consist of the express powers, namely, such as are named in the official document containing a statement of its purposes and the business in which it is to engage, and the powers which would be reasonably implied under the rule just mentiond, as necessary and incidental to the carrying out of the express powers. Such implied powers do not give the corporation any power to do acts which are not reasonably necessary and incidental in its regular business. To allow validity to acts not so reasonably necessary and incidental would be in reality allowing the corporation to engage in outside business; that is,

in one which under its charter it did not have power to take up. As an illustration of this, let us assume that the X company was incorporated to build, run and operate a railroad between two towns named A and B. The official charter of the corporation may state further details of the corporation's powers or it may not. But, if such details are not stated, the corporation would, obviously, have as express powers, the power to build the road and to operate it between the towns mentioned. It would also have as implied powers the power to do any act reasonably necessary or incidental to the operation of a railroad, such for example as the purchase of rails, ties or other railroad supplies, the hiring of employees, erection of stations and the power also to give negotiable paper in payment for such supplies or the raising of money by mortgaging its property or otherwise where necessary to carry on its business. In other words, the corporation may be said to have as implied powers all the powers which an individual would reasonably and usually exercise if he were operating the railroad. However, the corporation would have no power, express or implied, to do any act not reasonably necessary to the railroad business, such, for example, as the purchase of a stock farm or the operation of a steamer line or a grocery store, or the leasing of its line. If the corporation, then, should make any contract with relation to engaging in these outside matters—the corporation having no power to en-

gage in them—a valid contract could not arise and therefore the corporation could not be held liable thereon.

151 ULTRA VIRES ACTS.—Where a corporation attempts to do an act which is clearly beyond its express or implied powers, such act is generally termed an "ultra vires" act, and it may frequently consist in an attempted contract by a corporation. Hence we must consider with some care contracts of corporations which may be termed ultra vires. As the corporation lacks power it is generally said that the contract does not arise and hence neither the corporation nor the person with whom it attempted to contract would theoretically be bound thereon. Yet, in many States, a special rule has been adopted whereby a corporation may be held upon such contract in certain cases even though it had no power to make it. This may be termed the "doctrine of estoppel," and generally includes cases where the corporation has assumed to make a contract which was ultra vires or beyond its powers but which would appear to an outsider as incidental to the corporate business and therefore as within its corporate powers. In such circumstances, if the outsider with whom the corporation assumed to make the contract does in fact rely reasonably upon the corporate power to make it, having been deceived by appearances and having no warning that the corporation actually lacked power, and having paid over money or delivered

goods or performed services or parted with other value under the contract, he may generally enforce the contract against the corporation. In other words, in such circumstances, the corporation is estopped or forbidden to get out of its obligation by asserting the point that it had no power to make such contract. However, this is strictly limited to cases where the corporation appeared to have the power to make the contract and where the person dealing with it had no reason to suspect or doubt its power in that regard, and where he had parted with some value of the kind mentioned in his reliance that the contract was within the corporate powers and therefore binding upon the corporation. Thus, where such person has done nothing toward carrying out his duty under the contract he would have no claim or right to enforce the same as a binding obligation of the corporation. Many courts also treat him somewhat differently and take the attitude that an outsider who has dealt with the corporation is entitled not to enforce the attempted contract, but is entitled only to recover from the corporation the reasonable value of such goods or service as it has voluntarily accepted from him.

152. FORMATION OF CORPORATIONS.—The formation of corporations under the laws of most States is a simple process, requiring in general the preparation of an official document sometimes termed the "certificate of incorporation" or the "charter," which paper sets forth the facts which

are required under the laws of the State wherein the corporation is to be formed. These laws, while not uniform, generally require a statement as to the name to be used by the corporation, the names of the proposed directors and incorporators, a statement of the general purposes or objects of the corporation, the location of its principal office and place of business, how long it is to last, the amount of its authorized capital, the par value of its stock, as well as a statement in regard to any preferred stock which may be contemplated. Other details are sometimes required under the various State laws. This official document must generally be signed or executed by those persons who are the incorporators of the corporation. As a rule, three or more incorporators are required, although in some States five is the minimum. This official document, after it has been duly executed, is usually to be filed in the office of the Secretary of State, and usually also in that of the county clerk of the county wherein its principal office is to be. This procedure, however, is subject to some variations and the statutes of the State involved must always be closely followed. As soon as the official document has been properly filed and the other necessary steps taken the incorporators hold the first meeting and effect an organization, after which time the corporation is generally in a position to transact business, although in some States it is provided in effect that corporations should not commence business until a certain share

of the capital has been paid into the corporation in cash.

153. MANAGEMENT OF CORPORATIONS. —The management of any corporation rests directly with the board of directors and they may be considered as the agents of the corporation to direct its business affairs. The directors, however, are subject in their action to any limitation upon their power which may have been contained in the charter or certificate of incorporation or which may have been adopted in the by-laws. The directors are also subject to any provisions in the statutes of the State, which frequently provide that they should not take certain important actions, such as the mortgaging of corporate property, etc., without special procedure involving a meeting and vote of the stockholders. Where, however, the directors' authority is not limited by the statutes or the charter or by-laws they may be considered as having full power to manage the affairs of the corporation. In connection with that power they may elect a president and other corporate officers and may appoint any other agents or employees at their discretion. They may also define the powers to be exercised by the president and the other officers and employees. This would give them power to limit the authority of the president or any other officer. However, where a person deals with the president or any other officer of a corporation in behalf of the corporation, he might usually rely reasonably upon his having simi-

lar power to that generally possessed by such an officer, and in many cases the corporation would be held bound by the acts of such officer even though he actually violated some limits placed upon him by the directors. This may be illustrated by assuming that the X company was in the business of manufacturing furniture, and A, the president thereof, had made a contract with B, an outsider, for the purchase from the latter of certain wood to be used in the corporate business. As a matter of fact, however, A, the president, had no power to make such contract, since the directors had passed a resolution forbidding him to purchase any raw materials without first having the proposed purchase approved by the board of directors. Therefore, A, as a matter of fact, would have no power to make the contract with B, on behalf of the corporation. Yet, B had not in any way been warned of this limitation upon A's power, and as the purchase of materials would be a usual one for the president or executive head of such a corporation to make, B might reasonably assume that A had power to make the contract. Therefore B would be able to hold the corporation to the contract under the principle of apparent authority, considered in connection with the law of agency. Naturally the directors would have a claim for any loss against the president, as he violated his duty and instructions from them. The by-laws of a corporation are generally adopted by the stockholders and provide for any matters relative to the

corporate management which are not provided for in the charter or certificate of incorporation. Such by-laws are binding upon all persons who know of them, or reasonably should know of them, provided they are not in violation of law and are reasonable. It is generally the rule that meetings to adopt new by-laws or to alter previous by-laws should be announced in some special way so that all parties may have a chance to be present to know of the matters to be taken up at such meeting.

154. ELECTION OF DIRECTORS.—The directors of a corporation are elected by the stockholders and the election generally takes place at the regular annual meeting of stockholders of the corporation. Either the entire board of directors is elected at that time for the ensuing year, or a portion of them. In this connection it is provided by the statutes of many States that at least a certain proportion of the total number of directors should be elected annually. The method of electing such directors at the annual meeting is usually provided for by the statutes of the various States, but it is commonly the rule that each stockholder should have one vote for each share of stock owned by him, although in some States they also allow what is termed "cumulative voting." This method of voting generally allows each stockholder to have as many votes as he owns shares of stock multiplied by the number of directors to be elected at the meeting and he may cast all of his votes for one or more of

the candidates. In other words if five directors are to be elected he may concentrate all his votes upon one or more of the candidates and is not compelled to vote for each one. This cumulative voting is authorized for the purpose of allowing the minority stockholders to concentrate their votes upon one or two of the candidates and thus have some representation upon the board of directors. As an illustration of this, let us assume that the X company had an authorized capital stock of $100,000, composed of 1,000 shares at the par value of $100 per share, and that all these 1,000 shares are issued and fully paid up. Let us further assume that six individuals each own 100 shares of stock and act in unison, thereby constituting a majority, the other 400 shares of stock being held by the minority stockholders. Each stockholder would usually have one vote for each share of stock owned by him, and therefore, if five directors were to be elected under the usual method of voting those individuals composing the majority of the stockholders would succeed in casting a majority of votes for each of the five directors. This would leave the minority without representation upon the board. If, however, cumulative voting were used, the minority having a total of 2,000 votes (400 multiplied by 5, the number of directors to be elected) could concentrate 2,000 votes upon one or two of their candidates and this would probably insure the election of such candidates to the board, thus giving the minority a repre-

sentation. In the case of a non-stock or membership corporation, each member has simply one vote for directors or for other purposes. It may be noted that the directors themselves, in their meetings, have also one vote each and this is entirely independent of the amount of stock which they may own in the corporation. It should also be noted that the directors in their meetings may not vote by proxy, but sometimes the members of a membership corporation may vote in this way. Voting by proxy is a usual practice in stock corporations. A proxy is merely a power of attorney or agency given in writing by one stockholder whereby he authorizes another person as his proxy to vote at a corporate meeting his shares of stock in his place. A proxy should be in writing and in a form in accordance with the statutes of the State involved, and is often, but not necessarily, under seal. A stockholder who has given a proxy may revoke it whenever he chooses and this would prevent the holder of the proxy from voting on it. This would be entirely independent of whether the person giving the proxy had by revoking it violated his contract with the person to whom it was given. Their contract in this respect would be only a private matter between them.

155. VOTING TRUSTS.—The proxy principle is involved in what are termed "voting trusts." These arrangements involve the placing by a number of stockholders of their stock in the hands of

certain persons, giving to the latter the right to vote on the stock; in other words, it is a concentration of the stock of a number of persons in the hands of one or a few persons. The latter are termed "voting trustees." It is necessary to consult the statutes of the various States with regard to the legality of such voting trusts, but they are generally permitted, with the restriction, however, that the agreement under which the stock is deposited with the voting trustee or trustees must be in writing and that any stockholder may have the right to deposit his stock with such trustee or trustees and become a party to the voting trust. The statutes also frequently limit the time during which such a voting trust may last.

156. ISSUE OF STOCK.—The stock of a corporation is in theory issued for an amount of money or property equal to the par value of the stock. In practice, however, in many States there is no limitation on the valuation which the promoters of a corporation may put upon the property or rights which are transferred to the corporation. The stock is regarded as fully paid in if property transferred to it is transferred as having the assumed value of the corporation's capital, however little the property may actually be worth. In other States, however, an official must approve the valuation put upon property transferred as payment for stock, and in such States it may be assumed that the assets of a corporation when it begins business represent at

least approximately the amount of its capital stock; even in such States, however, there is no difficulty in promoting a corporation which shall have a large capital though its property is of slight value. All that is necessary is to incorporate under the laws of another State which allows greater freedom. Corporations organized in one State are in general allowed to do business in other States; so that a corporation which is intended to carry on business in New York, may be incorporated in another State, where it is not expected to do business.

157. LIMITATION OF POWERS OF DIRECTORS.—There are various matters wherein directors of any corporation do not usually have power to act on behalf of the corporation without special authorization. Such matters include the amendment of the corporate charter, (thereby changing the purposes of the corporation), the change of the name of the corporation, the increase or decrease of authorized capital stock, the sale of the total corporate assets and franchise, the consolidation of the corporation where permitted by statute, and the giving of mortgages upon the corporate property. This last point is especially important since the validity of a corporate mortgage as security for a loan of money depends upon whether the mortgage was authorized and given in all respects pursuant to statute of the State involved. As these corporate mortgages not only are given as security for a single loan of money but also furnish security

often for very large amounts of bonds, the matter of the authority of the directors and the validity of the mortgage becomes of great importance. Therefore the statutes of the State involved must be followed closely as to the procedure in connection with the giving of a mortgage. It may be stated, however, with regard to this matter and the other special matters mentioned, the statutes generally provide that some form of authorization should be obtained from the stockholders, generally through their vote at a special meeting called for that purpose, of which proper notification and announcement have been given; that some form of certificate as to the proceedings at such meeting be made and filed by the secretary and treasurer or other designated officer of the corporation; that it should also be filed in the office of the county clerk of the county involved and in the office of the Secretary of State; and that some notification of the act in question be also given to the directors as well as the stockholders. It is, of course, impossible to take up the details, as to such matters, the only safe course to pursue being to follow with extreme care the statutes of the State wherein such action is to be taken. From the foregoing, however, the general purpose and effect of prevailing law may be seen.

158. DIVIDENDS ON STOCK.—Dividends on the stock of corporations are declared by the directors, who have power to use their discretion as to the amount to be disbursed in this way. The stat-

utes are, however, very explicit in prohibiting the declaring of any dividends except out of the surplus profits of the business conducted by the corporation. It is obvious that to declare dividends otherwise would involve the diminution of the capital and would convey an erroneous and misleading impression of the profits of the corporation. Various penalties are provided against directors who declare dividends in violation of law in this respect, it being sometimes provided that they shall be jointly and severally liable to refund to the corporation the amount improperly paid out as dividends or to refund to any persons who have been damaged by the false statement, the amount of their losses. The latter penalties are similar to those frequently imposed upon directors or officers for the rendering of false reports or other official statements as to the resources of the corporation. Various other penalties, some of them criminal, are also imposed by the statutes of the various States for wrongful acts of directors. With respect to dividends properly declared, the declaration of the directors generally provides that they shall be paid to all stockholders registered upon the books of the company at a specified date in the future. Hence, if a stockholder should sell or otherwise transfer his stock, after that date to another person, the latter, while becoming the owner of the stock, would not be entitled to the dividend when paid. It would be payable to the former stockholder, although, he might pursuant to the agree

ment made with the person to whom he sold the stock, turn over to the latter the amount of the dividend. An express agreement, however, would be necessary to produce this result.

159. STOCKHOLDERS AND DIRECTORS. —In certain cases stockholders may interfere with the action of directors in connection with the general management of a corporation, or may even oust the directors from their positions. These cases are extremely rare, since the power of directors is supreme as to all corporate matters as to which the statutes or by-laws do not provide for obtaining concurrence or other action by the stockholders. Where proof is offered, however, of fraud, violation of law or gross negligence of the directors whereby loss has been caused or is threatened, stockholders may in some cases obtain the ousting of directors. This sometimes results in placing a receiver in temporary charge of the corporation or in the holding of a special election of new directors. No complaint, however, will generally be entertained against directors merely because their judgment does not agree with that of the stockholders even if some action of the directors may not have resulted favorably to the corporation, provided such action was taken honestly and with all due care and regard to law. As an illustration, the directors of the X Company made a certain contract on behalf of the corporation whereby it was agreed with Y that property of the corporation should be transferred to

the latter for much less than its evident actual value. This operation would usually indicate fraud on the part of the directors, or at least such gross negligence as would in many cases justify stockholders in asking a legal inquiry into the action of the directors, which would result, if sufficient facts were proved, in their removal and an injunction against the performance of the contract. However, if the value of the property were doubtful and the directors had used all due care and effort to ascertain its true value and to obtain the best available price, no complaint could usually be made although it should later develop that a better price might have been obtained.

160. LIABILITY OF OFFICERS AND DIRECTORS TO THE CORPORATION.—Whether a corporation becomes liable by virtue of action taken by its officers or directors depends upon principles of agency applied to the law of corporations. These principles have been already stated. Whether the directors or officers are themselves personally liable is another matter. Conceivably they may be liable either to their employer (the corporation) or to creditors of the corporation. They are not directly liable to the shareholders as such. Any injury or wrong they may indirectly do to shareholders is directly done to the corporation, the shareholder being injured only because the corporation in which he is interested is injured. Shareholders may, however, institute proceedings against directors or

officers if, as not infrequently happens, the corporation itself, being controlled by the wrong-doers, fails to take proceedings. The shareholders in such a case, however, demand redress for the corporation, not for themselves; and whatever may be recovered, is recovered for the benefit of the corporation. The duty of the directors and officers of the corporation is analagous to the duty of any agent to his principal. That is, each officer or director must exercise reasonable diligence in the performance of his work and must observe fidelity to his principal. The application of these principles to particular facts is not always easy, but the principles themselves are plain. Especially the degree of care which directors are bound to use presents a troublesome question of fact. In a small business it may be the duty of a director to take active control of the policy of the company and supervise with some minuteness each business operation. Such direction is impossible where a great railroad or industrial corporation is concerned. In such a case directors necessarily derive their information from subordinate agents and cannot investigate facts for themselves. Directors are not liable for mistakes of judgment if they use reasonable care; if, however, they wilfully do an act which they know is not authorized by the charter or by-laws of the corporation, they will be liable for the consequences. Directors who are cognizant of wrongs committed by their co-directors and fail to take available measures to pre-

vent the wrongs, become liable themselves. Directors may terminate their liability for future acts by resigning, but resignation will not destroy liability for acts already done even though the resulting damage does not happen until after resignation. The corporation requires that a director or other officer shall not act on behalf of the corporation in a matter in which he has a personal interest at variance with that of the corporation. Should matters of this sort arise, as they often do, the interested officer or director should not take part in the decision of the question, and may render himself liable if he does so.

161. LIABILITY OF OFFICERS TO CREDITORS.—So long as a corporation is solvent, creditors of the corporation have no reason or right to seek redress from any one but the corporation itself. Creditors of an insolvent corporation, however, may enjoin action by the company's officers which is unauthorized or likely to prove detrimental to the assets of the corporation. If the officers knowingly misapply the assets of an insolvent corporation they are personally liable to the creditors for the injury caused thereby. They are liable sometimes by statute, but also even apart from statute, for false statements of the condition of the corporation in reliance upon which credit is given the corporation. Like other agents, the officers of a corporation impliedly warrant to persons with whom they deal their authority to do the acts which they undertake; and if

authority is lacking, they are liable personally. The only qualification of this principle is that if the facts from which authority, or lack of it, may be determined, are known to the person dealing with them, they are not liable; that is, they do not warrant the correctness of an inference of authority from known facts.

162. LIABILITY OF BANK OFFICERS.—The principles governing the liability of bank directors and other officers of a bank are the same as those which govern similar questions to those of other corporations. The bank laws, however, impose certain duties and penalties which affect the application of general principles. It may be worth while to enumerate briefly some of the duties of different bank officers, a violation of which render them personally liable. As to directors it has been said that "It is not necessary to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidence of the management or misconduct were such that it must have been brought to their knowledge unless they were grossly negligent or wilfully careless in the discharge of their duties." They are liable for the consequences not only of their own fraud but of their ultra vires acts. They are liable for approving the discount of notes known to be worthless or of so doubtful value as to be obviously unsafe. If

guilty of negligence in failing to discover that such paper was worthless they may also be liable. They are guilty of negligence and may thereby render themselves liable if they wholly neglect to ascertain the condition of the bank from its books, though a thorough examination of the books of a bank, especially of one transacting a large business, cannot be expected of every director; and the law would require no more than would be demanded by the standard of reasonableness.

163. THE PRESIDENT.—The duties of the president, and consequently his liabilities, must be determined by general law, the charter of the particular institution, its by-laws, and by general business usage. Thus, if the usage exists for the president to draw and sign checks in the absence of the cashier, the president will have authority so to act. He has authority to conduct the litigation of the bank; he may employ counsel. He may generally indorse negotiable paper of the bank. On the other hand, he will be personally liable if he permits improper loans or over-drafts; if he fails to give proper instructions to inferior officers; if it is his duty to require a bond from an inferior officer, and he fails to do so; and, generally, if he commits a breach of duty to the corporation which causes damage. He has not authority to execute deeds of real estate without authority of the directors and, generally, an instrument which must be executed under the seal of the bank must be authorized by the board. The

discount of negotiable paper also is a duty of the directors.

164. THE CASHIER.—The Supreme Court of Maine has thus expressed the functions of the cashier of a bank: "A cashier, it is well known, is allowed to present himself to the public as habitually accustomed to make payment for its bills or notes payable to other persons; to make payment for bills and notes discounted by the directors; to receive payment for bills of exchange, notes, and other debts due to the bank; to receive money on deposit and to pay the same to the order of the depositors. He is presented as having the custody of its books, bills of exchange, notes, and other evidences of debt due to it, and, indeed, of all its movable property; as making entry in its books and as keeping its accounts and a record of its proceedings. In many banks these duties are performed in part by tellers, clerks, or assistants, but generally, it is believed, under his superintendence, and he might at any time assume the performance of them and perform them, if able to do so, without such assistance. His true position appears to be that of a general agent for the performance of his official and accustomed duties. While acting within the scope of this authority he would bind the bank, although he might violate his private instructions." He must exercise proper oversight over subordinate officers; he must use reasonable care and skill. He may become liable personally for failure to observe instructions

as to a special deposit; for the improper sale of stock held as security for a loan; for improperly making loans, for failure to give essential information to the directors; for failing to exercise proper oversight over inferior officers or agents, as well as in the more obvious case where he has taken advantage of his position to commit intentional fraud upon the bank.

165. PROMOTERS.—A corporation cannot be liable for the acts of a promoter before the corporation came into existence. It may, however, after coming into existence adopt the acts of the promoter and thereby render itself liable. If, knowing the terms of an agreement made by a promoter, the corporation takes advantage of the agreement or recognizes it, it thereby in effect itself becomes a party to the agreement. Unless the terms of a promoter's agreement expressly state the contrary, the promoter is personally liable upon it as a contractor.

CHAPTER IX

Sales of Personal Property

166. SALES AND CONTRACTS TO SELL.—Sales are to be distinguished from contracts to sell. A sale is an actual transfer of property, whereas a contract to sell is an agreement to make a sale in the future. Sales at a shop, for instance, are made without any contract to sell, but orders for goods at a distance, and agreements to ship them, frequently precede the actual sale of the goods, which is made in pursuance of the prior contract to sell. The sale of personal property is subject to different rules from the sale of real estate. In the transfer of real estate, formalities of deed and seal are necessary, which are not required in personal property, and the subjects must be considered separately.

167. FORMALITIES NECESSARY FOR SALE.—The only requisite to make valid a contract to sell or a sale of personal property is the assent of the parties, unless the local Statute of Frauds covers sales of goods (as it does in most States) and the value of the goods exceeds the statutory amount, as stated in Chapter III. In that event there must be either part payment of the price, a delivery of the thing purchased, or a written memorandum of the bargain signed by the party whom it is sought to charge. There is no difficulty about consideration. The transfer of title or promise to transfer it is al-

ways sufficient consideration for the promise to pay the price and vice versa. We should add further that there are certain kinds of personal property that have special modes of transfer. These are not, however, generally tangible personal property, but they are representatives of property—choses in action, as the legal phrase is—which simply means intangible things to which you have a right as distinguished from choses (or things) in possession, as chattel property which you can handle and deliver. A patent, a deed, a copyright are choses in action, whereas any chattels capable of manual delivery are choses in possession. Now, certain choses in action have special modes of transfer. The commonest instance is that of negotiable instruments. If payable to order they have to be transferred by indorsement. Bills of lading, warehouse receipts, patents, copyrights, all have special modes of transfer.

168. IMPORTANCE OF DISTINGUISHING SALE AND CONTRACT TO SELL.—Why is it important to distinguish between a contract to sell and a sale; what difference does it make whether title has passed or not? The primary reason that it makes a difference is because as soon as the title has been transferred from the seller to the buyer the seller is entitled to the price. Prior to the transfer of title, if the buyer refused to take the goods the seller would be entitled only to damages, which would be the difference in value between the value

of the goods which the seller still retained and the price which was promised. If the goods were worth as much or more than the amount of the price the seller would not be entitled to any substantial damages. But after title has passed the buyer must pay the full price, and the seller may recover it if the buyer refuses to accept delivery. Another consequence flowing from the transfer of title is that the goods are thereafter at the risk of the buyer. If they are destroyed by accident the buyer must nevertheless pay the price, for the right to the price accrued before the goods were destroyed, and when they were destroyed they were at the buyer's risk. Bankruptcy is another circumstance which makes it important to determine whose goods they are. If the buyer becomes bankrupt after title to the goods has passed to him his trustee in bankruptcy takes the goods for his creditors, but if he becomes bankrupt before title has passed that would not be true. The bankruptcy of the seller would make a similar difference.

169. WHEN TITLE IS PRESUMED TO PASS.—Now, there are several presumptions in the law as to when title will be presumed to pass if there was no specified agreement between parties as to when it should pass. If they simply bargain for the goods without saying anything about the moment when the buyer is to become owner, the first of these presumptions is that title presumably passes as soon as the goods are specified and the parties

are agreed on the terms of the bargain, even though no part of the price has been paid and though the goods have not been delivered. It is often assumed that delivery is essential to transfer title to goods, but that is not so, though delivery is strong evidence of intent to transfer title. If the parties have made their bargain, and definitely agreed on the terms of the bargain, title passes even though possession of the goods still remains in the hands of the seller. The seller, however, has a lien for the price though he has parted with title. As long as the goods are in his possession he may refuse to surrender until he is paid the price, unless he agreed to sell on credit.

170. TITLE PASSES WHEN PARTIES AGREE.—It is only a presumption that where the terms of a bargain are fixed and the goods are specified title passes at once, and if the parties agree that title shall not pass at once it will pass when and as they agree. Their intention in regard to the transfer of title may not be stated in express terms, and it may be gathered only from the acts or words of the parties. If something remains to be done to the goods by the seller to put them in a deliverable condition, that indicates an intent that title shall not pass until they are in the condition agreed upon. If the parties provide that they shall be stored at the expense of the seller for a time or at the risk of the seller, that indicates title is not intended to pass, for if they are at the seller's expense and risk, presumably they are still his goods. On the other

hand, delivery of the goods indicates an intent to pass title, although it is possible, if the parties so agree, that title should not pass even though the goods are delivered. Again, payment of the price is evidence tending to show an intent to pass title, for buyers do not ordinarily pay the price in advance. It is not uncommon for credit to be given by the seller, but it is uncommon for the buyer to pay first, but even that is not impossible, and therefore, though payment of the price is evidence of an intent to transfer title immediately, it is not conclusive evidence.

171. TRANSFER OF TITLE BY SUBSEQUENT APPROPRIATION.—Suppose title does not pass immediately, which may be due to the fact that the parties so agreed, or to the fact that the goods were not specified at the time the bargain was made. That is a common case. A and B contract for the sale of 100 cases of shoes to be made by A. At the time the parties make their bargain there are no 100 cases of shoes, but the parties expect them to be made later, and appropriated to the bargain, as the legal phrase is. Or title may not pass at the time the bargain is made, although the goods are specified. The parties may have expressly agreed that title should not pass; or though the goods are specified, something may remain to be done to them by the seller to put them in a deliverable condition. Now, if title for any of these reasons does not pass when the bargain is made, it may

pass by an express agreement of the parties made later that the buyer shall take title and that the seller shall give title; or frequently it may pass by what is called an appropriation of the goods by the seller to the buyer without any express later assent of the buyer, by virtue of an implied assent of the buyer given in the original agreement that the seller should appropriate the goods. What is meant will be understood by one or two illustrations.

172. APPROPRIATION BY DELIVERY TO A CARRIER.—Suppose A contracts to sell and ship to the buyer 100 cases of shoes, and B contracts to receive and pay for them. That shipment to the buyer is an appropriation of the goods. The very 100 cases with which the seller intends to fulfil the bargain are indicated by the delivery of them to the carrier, and the buyer, since he agreed in the first place that they should be shipped, has assented to the appropriation. Therefore, in such a case, as soon as the goods are delivered to the carrier the presumption is that title passes to the buyer. This is by far the commonest case of appropriation by the seller in accordance with authority given by the buyer in his original agreement, and it is so common that it deserves a little further treatment.

173. THE SELLER MUST FOLLOW EXACTLY AUTHORITY GIVEN HIM.—Suppose the buyer specified that the goods are to be shipped and the seller shipped them by another way, another route? Title would not pass then because the

buyer had not authorized the seller to appropriate them to him, the buyer, in that way. It may be that the seller's way of sending them was better than that originally assented to by the buyer, but the seller, if he wishes to hold the buyer as owner of the goods from the time of shipment, must get his approval of that better way. Still more important than the method of shipment is the character of the goods themselves. The seller cannot, by putting any goods on the train, transfer title. He must put on the train the very kind of goods which the buyer agreed to receive, and that will mean not simply in the case supposed that the goods must be shoes, but they must be merchantable shoes of the character and sizes which the buyer agreed to take. The goods must be properly packed and all usual precautions in regard to them taken. In so far as the original agreement specified what was to be done, those things must be done. In so far as the original agreement does not specify how the goods are to be shipped, or what shall be done in regard to them, the seller has discretion to do anything which is customary and proper for a careful business man.

174. SALE OF LIQUOR SENT BY A CARRIER.—This kind of appropriation becomes important frequently in regard to the sales of liquor. A lives in an outlying suburb of Boston where the sale of liquor is not permitted. He buys goods of S. S. Pierce Company in Boston and wants to buy some beer from them. He can buy beer of them in Boston

and send it out to his home, but the title must pass to him in Boston. If the title passes in the suburb it is an illegal sale by S. S. Pierce Company, and consequently they do not want to make it. Of course the buyer can go and get the goods and pay for them in Boston and send them himself to his residence. But suppose he sends an order by mail; if S. S. Pierce Company are willing to charge goods to him, giving him credit, they can send the goods by express, because on their shipment of the goods the title will pass and the buyer will become a debtor for the price of the goods in Boston; but they must not send the goods by their own wagon, as their carrying the goods themselves out to the buyer's residence leaves them in their possession until delivery, and the delivery does not take place until the goods are delivered from their wagon at his house. That would not do. Whereas if the goods are delivered to a public carrier in Boston the carrier would be the buyer's agent and title would pass there.

175. SHIPMENT OF GOODS C. O. D.—There has been a good deal of litigation in regard to the effect of shipping goods C. O. D. Suppose goods were ordered and goods of the sort ordered were shipped in accordance with the directions in the order, but they were marked C. O. D. Those letters mean, as you know, collect on delivery, and two possible explanations may be given of their effect. One, that the seller retains not only control of, but also title to, the goods until they are delivered and

the price paid. According to that view the carrier is made the seller's agent, to hold the title to the goods and transfer it to the buyer when he pays for the goods. But the better view is that the carrier merely retains a hold on the goods, a lien on behalf of the seller, while title to the goods passes on shipment.

176. EFFECT OF THE FORM OF A BILL OF LADING.—One cannot speak of title passing or being retained on shipment of goods without referring to bills of lading, for the general rules which have been given must be qualified by this statement, that by means of a bill of lading the title may be at will retained or transferred (if the buyer has authorized a transfer). The proper way to indicate a transfer of title when goods are shipped is to have the buyer named as consignee in the bill of lading. A bill of lading is very like a promissory note; the carrier promises to deliver the goods to somebody who is called the consignee, and who corresponds to the payee of a note. There is the further feature in a bill of lading, that the carrier acknowledges receipt of the goods which he promises to deliver and that they have been received from the consignor, that is, the shipper.

177. ILLUSTRATIONS.—Now, when S. S. Pierce Company decide to ship goods to a buyer, it may consign them to the buyer or it may consign them to itself; that is, the same person may be consignor and consignee. That is very common in

business, in order that the shipper may retain title to the goods until he gets paid. He takes the bill of lading in his own name and then generally attaches a draft on the buyer of the goods, and sends the bill of lading and the draft together through a bank. The bank notifies the drawee of the draft, who is the man who has agreed to buy the goods, that the bill of lading with the draft are at the bank, and that the buyer may have the bill of lading when he pays the draft. The buyer pays the draft and gets the bill of lading, and then for the first time does he become the owner of the goods. On the other hand, if the shipper—S. S. Pierce Company—had consigned the goods directly to the buyer, the buyer would have become owner of the goods on shipment, provided the buyer had authorized that shipment. The seller cannot, however, by naming a buyer consignee make the buyer owner of any goods which he had not agreed to receive. So much for appropriation of the goods to the buyer by shipment. In another chapter fuller reference will be made to bills of lading as documents of title and as bank securities. In this connection they are referred to merely as indicating an intention to transfer or retain title as between buyer and seller.

178. IMPORTANCE OF DELIVERY IN SALES OF GOODS.—Title to chattel property, it has been said, may pass without delivery. This is true as between the parties, but as against creditors

and third persons delivery is necessary. Suppose A sells a horse to B and does not deliver the horse, and A afterwards sells the horse to C and does deliver the horse to C, B comes around to C and says, "That is my horse. I paid A the full price." C may say, "I bought him in good faith. I thought it was A's horse. I have got him and I am going to keep him." C can keep him.

179. GIFTS ARE INVALID WITHOUT DELIVERY.—In connection with the subject of delivery in sales, a word may be said as to its importance in gifts. Even between the parties gifts are invalid unless accompanied by delivery, or made by deed under seal. The transaction without delivery or deed is, in effect, a promise to give, and there being no consideration the promisor may subsequently refuse to keep his promise. Often a person about to die attempts to make gifts. If a savings-bank book, a bond, a stock certificate, a life-insurance policy, a note or check of a third person (but not one made by the giver), or any chattel property is delivered to the donee, the gift is binding and irrevocable; but otherwise the donee gets nothing and the donor's executor is entitled to the property and must treat it as assets of the estate.

180. PLACE OF DELIVERY.—Certain contractual rights between the buyer and seller are implied from the nature of the bargain of sale. A seller is under an implied obligation not only to transfer title to the buyer, but to deliver possession to

him. Where must the seller deliver possession? If the contract states the place, the terms of the contract decide that question. If the contract does not expressly state where the place is to be, the place of the seller's residence is the place where the seller is bound to deliver, unless the goods are too heavy for easy transportation, and in that case the place of delivery is the place where the goods are at the time of the bargain. That may be the seller's place of business, and it may not be.

181. DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS.—Concurrently with the seller's duty to deliver possession, the buyer is under a duty to pay the price, unless the contract provides for a period of credit. The delivery and the payment of the price are, in the absence of contrary agreement, concurrent conditions. The seller must offer to deliver if he wants to get a right of action for the price, and the buyer must tender payment if he wants a right of action for the goods. The tender of price and delivery must be at the place where payment and delivery is due. It may be asked, how is the seller to tender the goods at the place delivery is due if that is the seller's place of business and the buyer does not come near there? The answer is that it is in effect a tender for the seller to have the goods in the place where they were to be delivered, ready and willing to deliver them. If the buyer does not come there the buyer must, nevertheless, pay the seller. By the seller's

readiness to perform at the place where performance was due, and deliver if the buyer with his money were at the place where payment was due, there is in effect a tender.

182. RIGHT OF INSPECTION.—The buyer and seller have certain other implied rights and duties. A right which the buyer always has, in the absence of agreement to the contrary, is a right to inspect the goods, to see that he is getting what he bargained for, before he accepts title and pays the price. He may, however, waive this right of inspection; he may agree to pay the price without seeing what he is getting, and in modern business this is not uncommon. One sort of bargain frequently made contains this term: "Cash against bill of lading." That means the buyer is to pay the price of the goods on receiving the bill of lading. The bill of lading will usually reach him before the goods, and, therefore, before he has a chance to inspect; and by the terms of his bargain he has agreed to pay cash against the bill of lading and he must do so. Of course, if the goods when received turn out not to be what he bargained for, he has a right to sue for breach of contract or recovery of the price paid. But in the first place, when the bill of lading comes he has to assume that the goods are going to be right and pay for the bill of lading. Another case where a right of inspection is waived is where goods are sent C. O. D. You order goods to be sent in that way and the expressman brings them. You say you

want to open the package and see if the goods are right. You will find the expressman will not let you. He will say, "No, you have got to pay for the sealed package," and until you do so, you will have no right to the possession of the goods. If the goods are not all right you have redress by suing the seller, but you have got to pay your money first.

183. WARRANTIES.—Another and most important right which the buyer has is the enforcement of warranties. Warranties of a chattel may be either express or implied. An express warranty is a promise or an obligation imposed by the law because of a representation which the seller has made in regard to the goods. The simplest form of warranty is where the seller says, "I warrant this horse is sound," or, "I warrant this piano will stay in tune for a year." Those warranties are promises and are subject to the same rules as other promises. They are contracts for consideration, the consideration for the promise being in each case the purchase of the goods. But we have warranties which are not based on promises strictly so called and yet are express. A tries to sell a horse. He says the horse is perfectly sound, four years old, broken to harness, has trotted a mile in three minutes. Those are in form representations rather than promises; they are assertions of fact, and when A makes them it is possible he does not understand that he is binding himself for the truth of his statements; and yet if they are made as positive statements of fact the

seller is held to warrant the truth of those statements.

184. REPRESENTATIONS OF FACT AND OF OPINION.—The great distinction between warranties by representation and statements in regard to property which do not amount to express warrants is that between statements of opinion and statements of positive fact. If the buyer said, "I believe the horse can trot in three minutes any day," that would not be a warranty; even the statement, "The horse can trot in three minutes" would probably not be a warranty; but the statement, "The horse has trotted a mile in three minutes," is a direct assertion of fact, and the element of opinion does not occur and therefore that would amount to a warranty. Statements of value do not amount to a warranty. Those are necessarily to some extent matters of opinion. General statements of good quality do not, ordinarily, amount to a warranty. The courts, however, are getting stiffer and stiffer in regard to these matters. It used to be the law that a seller could represent nearly anything he chose in regard to his goods and not be bound so long as he did not expressly say, "I warrant," or make a promise in terms in regard to them. That was called the rule of "caveat emptor"—"let the buyer beware"—but this rule is pretty well wiped out so far as representations of fact are concerned. Now, the seller would better beware what he says, for he may find himself liable as a warrantor.

185. NO WARRANTIES IMPLIED IN SALES OF REAL ESTATE.—There are certain warranties implied, although the buyer does not bargain for them and although the seller makes no express representations. In this respect sales of personal property differ entirely from sales of real estate. In the case of real estate you get no warranty but what you bargain for. If you get a deed without words of warranty, and it turns out that the seller had no title, in the absence of fraud you have no redress; you cannot get your money back though you have got no title to the land.

186. WARRANTY OF TITLE IMPLIED IN SALES OF PERSONAL PROPERTY.—In the case of personal property it is otherwise. The first implied warranty that exists in the case of a sale of personalty, unless the contrary is expressly agreed, is the implied warranty of title. The seller impliedly warrants that he has title to the property and will transfer title to the buyer. The only exception to this is where a sale is made by a person in a representative capacity, as by a sheriff or an agent. In that case the person making the sale does not impliedly warrant title. In the case of an agent, however, if the agent was authorized to make the sale, the principal would be liable as an implied warrantor of title; and if the agent was not authorized to make the sale the agent would be liable as warranting his authority—not as warranting title to the goods, but warranting that he had a right to

bind his principal. Even in the case of a sale by an agent, therefore, the purchaser gets substantial redress if the title turns out to be defective. It is possible, of course, by express agreement, for a buyer to buy and a seller to sell merely such title as the seller may have; but there must be an express agreement, or very special circumstances, indicating that such was the intention of the parties, in order to induce a court to give this construction to a bargain.

187. IMPLIED WARRANTY OF QUALITY IN SALES BY DESCRIPTION.—Not only are there implied warranties of title, but there are also implied warranties in regard to the quality of goods. The fundamental principle at the bottom of implied warranty of quality of goods is this: if the buyer justifiably relies on the seller's skill or judgment to select proper goods, then the seller is liable if he does not deliver proper goods. We may distinguish in regard to implied warranties of quality, sales of specific goods—that is, sales of a particular thing—and sales of goods by description. In the case of sales by description there is always an implied warranty that the buyer shall have not simply goods which answer that description, but merchantable goods which answer that description. Suppose a seller contracts to sell so many hogsheads of Manila sugar. The law formerly was that the seller could tender to the buyer in fulfillment of that contract the worst article that he could find which would bear the name of Manila sugar. The law at

present is that the seller must furnish to the buyer merchantable Manila sugar; that is, Manila sugar of average and salable quality. It does not have to be the best, but it must be ordinarily salable as merchantable Manila sugar.

188. IMPLIED WARRANTY IN SALES OF SPECIFIED GOODS.—Contrast with that case a contract to sell a specific identified lot of Manila sugar before the buyer and seller. Is the buyer bound to take without objection that specific lot, whether or not it turns out that it is merchantable? Or suppose you go to a shop where they sell bicycles and buy a bicycle; you pick out a specific bicycle, and it turns out that, owing to defects in manufacture, it is not good for anything. It breaks down the first time you ride it. May the seller say, "You looked at what we had in stock and this is the machine you agreed to buy?" It is in this class of cases that the question of justifiable reliance by the buyer on the seller's skill and judgment becomes important, and in determining whether the buyer justifiably relied on the seller's skill and judgment several things must be considered.

189. INSPECTION AS AFFECTING IMPLIED WARRANTY.—Was the defect open to inspection and was there opportunity to inspect the goods? If there was, there is less reason to suppose that the buyer was relying on the seller's skill and judgment than if the defect was latent and not open to inspection.

190. IMPLIED WARRANTY WHERE THE SELLER IS A MANUFACTURER.—What was the nature of the seller's business? Was he a manufacturer of the goods in question? The strictest rules of implied warranty of quality are applied against manufacturers, and this is, you will see, reasonable, because the manufacturer ought to know about the goods, and the buyer naturally relies on the manufacturer, as knowing about the character of the goods, to give goods of proper quality. Therefore, unless the buyer pretty clearly assumes the risk himself of picking out what is satisfactory to himself, a seller who is a manufacturer will be held to warrant the merchantable quality of the goods which he makes and sells.

191. IMPLIED WARRANTY WHERE THE SELLER IS A DEALER.—The next grade below a manufacturer is a dealer in that sort of goods. He cannot have the same knowledge as a manufacturer, but still, a dealer in goods of a particular kind is much more competent to judge of their quality than an ordinary buyer, and therefore a dealer also, unless there is special reason to suppose the buyer did not rely on his own judgment, will be held to warrant that the goods are merchantable.

192. IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE.—Sometimes there is a warranty of still greater scope than a warranty of merchantability; that is, a warranty of fitness for a particular purpose. A buyer agrees to

buy glue of a manufacturer. The buyer is, as the glue manufacturer knows, a furniture manufacturer. The glue manufacturer sells the buyer glue which is merchantable glue, but is not good furniture glue, as furniture glue must be of unusual tenacity. The seller is liable here under an implied warranty. He knew that furniture glue was wanted. He was a glue manufacturer, and he ought to have understood that the buyer was looking to him to furnish glue of a sort that would not only be salable as glue but would fulfill the purpose which the buyer had in mind.

193. KNOWN, DESCRIBED AND DEFINITE ARTICLES.—On the other hand, if the buyer orders what is called a known, described and definite article, he takes upon himself the burden of determining whether the thing which he buys will fulfill his purpose or not. For instance, a buyer in Missouri ordered of a boiler manufacturer two boilers from the catalogue of the boiler manufacturer, describing them by number. The boilers were good boilers, under ordinary circumstances, but the amount of mud in the Missouri River, on the banks of which the boilers were to be used, was so great that they could not be successfully used there. The buyer had no redress against the seller in that case. He had taken upon himself to specify the particular kind of boilers he wanted; he got them and they were merchantable boilers. The only trouble was that they were not fit for use in the place where the

buyer was intending to use them. If the buyer had simply ordered boilers for a factory on the Missouri River, the result might well have been the other way, for that would have put the duty on the seller to furnish something that was suitable for that purpose.

194. RELIANCE ON THE SELLER IS THE ESSENTIAL ELEMENT.—The great thing to remember throughout the whole subject is that the implied warranty of quality depends on the justifiable reliance of the buyer on the seller's skill. If the goods are not merchantable under circumstances where the buyer does rely, he can recover from the seller, even though the seller was not guilty of negligence. A warranty is not dependent on negligence of the seller.

195. REMEDIES FOR BREACH OF WARRANTY.—One of the remedies allowed in many but not all States for breach of warranty is to take the goods back and demand the purchase money back, but that is only one remedy. Another remedy which is universally allowed is to sue for whatever damage the breach of warranty may have caused, and one or two cases will show how serious these damages may be. A seller sells a pair of sheep to a buyer with a warranty, express or implied, of their soundness. They have an infectious disease, and when put with a large flock of the buyer's sheep they infect the whole flock, and the damage is the loss of the whole flock. Another actual case was

based on an implied warranty of the quality of rags sold to a paper manufacturer. The rags came from Turkey and were infected with smallpox. They gave smallpox to the operatives in the buyer's mill, and the mill had to be closed down, which caused great loss to the manufacturer. All that loss can be recovered from the seller of the rags, even though he was not negligent in bringing the result about.

196. ONLY ORIGINAL BUYER CAN RECOVER ON A WARRANTY.—Nobody, however, can recover on a warranty except the original buyer. For instance, the operatives who caught smallpox could not sue the seller unless the seller was negligent. If he had been careless or negligent in disregarding their safety, they could sue him in an action of tort, though they had no contractual relation with him. And if the buyer resells the goods the purchaser from him cannot sue on a warranty given to the original buyer.

197. EFFECT OF ACCEPTING DEFECTIVE GOODS.—Another matter that has caused a good deal of litigation in regard to warranty and the obligation of the seller in regard to the quality of goods is the effect of acceptance by the buyer of goods which are offered to him. Suppose a certain quantity of Manila sugar is offered to one who has agreed to buy, and he takes from the seller that quantity of sugar, but it is not of as good quality as it ought to have been. The buyer subsequently objects, but the seller says, "You should have objected

to that at the outset and refused to take it. Your taking it is an assent or acceptance of it as a fulfillment of the contract, and any right you may have had is gone." It is settled law that if the defect was not observable with reasonable care the buyer does not lose any right by taking the goods, provided he gave prompt notice of the defect as soon as it was discovered. Further, even though at the time of delivery the buyer observed the defect or might have observed it, it is the law of most but by no means all States, that taking the goods does not necessarily indicate assent to receive them as full satisfaction of the seller's obligation. The buyer may receive the defective goods as full satisfaction, but the mere fact of taking them does not prove it. It is advisable, however, for the buyer as soon as he sees the defect to protest against it. He may in most States safely take the goods if he says in taking them, "These goods are defective and I do not take them in full satisfaction;" or, if he does not discover the defect immediately on taking the goods, he ought to give notice as soon as he does discover that the goods are defective, and state that, though he proposes to keep them, he does so subject to a claim for their defective quality.

198. SELLER'S RIGHTS WHERE BUYER FAILS TO ACCEPT GOODS.—Now the seller has some rights, also, that should be referred to. In the first place, if the buyer refuses to take title to the goods when they are tendered to him, the seller

has a right to recover damages. The amount of damages will be the difference between the value of the goods which the seller still retains, because the buyer will not take them, and the contract price which was promised. If the goods are worth as much as the price promised for them the seller's damages will only be nominal, for he has got the goods and may sell them to somebody else for as good a price as was stipulated for in the original bargain.

199. SELLER MAY RECOVER PRICE WHERE TITLE HAS PASSED.—If title to the goods has passed the seller may sue for the price. This right to the price is secured by a lien on the goods as long as the seller retains possession of them. If the seller has parted with possession and with title, he cannot get the goods back except in one narrow class of cases.

200. STOPPAGE IN TRANSIT.—If the goods are in the hands of a carrier, or other intermediary between the seller and buyer, even though title passed on delivery to the carrier, the seller may stop the goods in transit if the buyer becomes insolvent before they are actually delivered to the buyer. The right is exercised by notifying the carrier to hold the goods for the shipper since the buyer has become insolvent. The right of lien and of stoppage in transit is given the seller to enable him to secure the price, which is the thing of interest to him in the contract.

201. LEGAL AND EQUITABLE TITLES.—A legal title is a full right of ownership against everybody. The legal owner can take his goods wherever he finds them. An equitable title is a right to have the benefit of the goods or property, and frequently involves a right to have the legal title also transferred to the equitable owner, making him full legal owner. The peculiar feature of an equitable title, however, is that it is good only against the particular person who, as the phrase is, is subject to the equity, and also against any person who has acquired the property, either without giving value or with knowledge of the equity. To put the matter conversely, an equitable title is not good against a purchaser for value without notice, or, in the language of the Negotiable Instruments Law, against a holder in due course.

202. FRAUDULENT SALES.—This principle is important in other branches of the law besides that governing negotiable instruments. The most common case of equitable rights in sales arises in fraudulent sales. Where a sale is induced by fraud of the buyer, he gets the legal title to the goods, but the seller has an equitable title or right to get the goods back. Let us see how this works out. The buyer procures goods by fraud and he sells them to somebody else. Now, the defrauded seller cannot get the goods back from that somebody else if he paid value for them in good faith. If he did not, then the defrauded seller may get the goods

from him or anybody who stands in the same position. If the defrauded seller can reach the goods before they have left the hands of the fraudulent person, he may replevy them or seize them if he can do so. It is not worth while to go into the various kinds of fraud that may be practiced in the sale of goods, but there is one specific kind that comes up very commonly which is worth mentioning; that is, buying goods with an intention not to pay for them. Generally, in order to create a fraudulent sale, it is necessary that the fraudulent person shall have made some misrepresentation in words, but here is a case where, though it may be said there is a misrepresentation, it is not put in words. It may be said there is a misrepresentation, for it is fair to say that every buyer when he buys goods not only promises to pay but represents that his intention is to pay for the goods, and perhaps that his financial condition is not so hopeless as to make the expectation utterly impossible of fulfillment. If the situation actually was that the buyer either had a positive intention not to pay, or was so hopelessly insolvent that any reasonable person would know he could not pay for the goods, the transaction is fraudulent; the seller still retains an equity, and may reclaim the goods from the buyer who has acquired a legal title or from any other person except a bona fide purchaser. This question often arises in bankruptcy. Suppose the buyer goes bankrupt and the goods come into the hands of the buy-

er's trustee in bankruptcy. The trustee in bankruptcy is in legal effect in such a case the same person as the bankrupt; he is not a bona fide purchaser from him, and thus the seller may reclaim the goods from the trustee in bankruptcy just as he might from the bankrupt. In the case supposed the seller has been fraudulently induced to part with his title and may reclaim it. A case may be supposed, however, where the seller fraudulently retains his title, and here the buyer's creditors may seize the goods as if the title were in the buyer. Thus it is a fraud to make a conditional sale of goods to a person who intends, and who is understood to intend, to sell the goods again. The reason why it is a fraud is because it is inconsistent on the part of the wholesaler to say, "I retain title of the goods until paid for, yet I give them to you, knowing that you are going to put them in your stock of trade."

CHAPTER X

Sales of Real Property

203. DISTINCTION BETWEEN THE LAW GOVERNING SALES OF REAL AND PERSONAL PROPERTY.—The main distinction between the law governing real and personal property is the increased formality necessary in transactions governing real estate. Contracts for the sale of real estate must be in writing and actual conveyances of an interest in land must not only be in writing, but, except where seals have been abolished by statute, must be executed under seal. In order to make the transaction valid against third persons, record in the Registry of Deeds in the county where the land is situated is also requisite. Unless a contract for the sale of real estate is recorded, a subsequent conveyance to a purchaser for value without notice will destroy the right of the buyer under the first contract to get the land though he will still have an action for damages against the seller. So in many jurisdictions creditors of the man contracting to sell may by attaching the land as the seller's property satisfy their claims from it to the detriment of the buyer's right. Therefore, an actual conveyance of real estate must be recorded in order to protect the grantee. As a pre-requisite for record it is generally required that contracts and deeds of real

estate shall be acknowledged before a notary public or other official.

204. DUTIES OF BUYER AND SELLER UNDER CONTRACT TO CONVEY REAL ESTATE.—The primary duty of the seller in a contract to convey real estate is to transfer a good title. It is important for the buyer to determine before the time for performance whether the seller's title is good in order to determine whether he himself will accept the deed and pay the price. Accordingly the buyer has the title examined by search in the Registry of Deeds. If the search discloses that the seller's title is defective the buyer does not on that account necessarily have a right to rescind the contract. The defect of title may be removed before the time of performance, and if the nature of the defect is such that this is possible, the buyer can only give notice of the defect and request its removal. If the title of the buyer is so defective that it cannot be cured, or if the seller manifests by his conduct an intent to repudiate the contract, as by selling the land to another, the buyer need not wait for the time for performance, but may at once give notice that he rescinds the contract. Unless the seller has expressly contracted to convey by warranty deed, his obligation is generally satisfied by a quit claim deed. The seller is also bound not to commit waste on the premises between the time of the contract and the time of performance. The rule in regard to accidental injury is stated hereafter, but

as to intentional or negligent injury of the premises, the law is clear that such an injury is a breach of duty by the seller. The buyer's duty is to pay the price according to the terms of the contract. The obligations of the seller to convey, and of the buyer to buy, are concurrent, unless the contract expressly provides the contrary; that is, the buyer in order to acquire a right against the seller must tender payment, as he demands a deed; and the seller in order to acquire a right against the buyer must tender a proper deed when demanding payment. The obligation of either party to tender may, however, be excused by circumstances showing that tender would be useless. Thus, if the buyer is insolvent, the seller need not tender a deed, and if the buyer has repudiated the contract or committed waste to a material extent, or conveyed the premises to a third person, the buyer need not tender payment, in order to acquire a right of action.

205. DOWER AND CURTESY.—By the common law a wife on her marriage acquired a right in her husband's land, which, though not vesting until his death, encumbered the title immediately. On his death she became entitled to a life estate in one-third interest of the lands of which he had been possessed since their marriage. Accordingly where the common law rule of dower still prevails, a husband cannot give an unencumbered title to real estate unless his wife joins in the conveyance. Similarly a husband was entitled at common law to a

life interest in the lands of his deceased wife if they had had a child born alive. This was called the estate by curtesy. Its extent, it will be observed, is not the same as that of dower. The husband's life interest extended to all the lands of the wife, but on the other hand, it did not arise at all unless there was a child born alive; whereas the wife's dower right arose immediately on marriage. The rules of dower and curtesy have been changed by statute to a greater or less extent in most States, but it is still almost universally important that a wife should join in her husband's conveyance of real estate, and that a husband should join in a wife's conveyance of her real estate.

206. DEFAULT IN PERFORMANCE.—The law regards more leniently a default in time in carrying out contracts for the sale of real estate than it does a similar default in the sale of personal property. In sales of personal property, especially if it is of a character which rapidly fluctuates in value, time is said to be "of the essence;" that is, the failure of either party to perform at or about the agreed day is fatal to his rights to enforce the contract; but, in the case of real estate it is generally held that time is not of the essence of the contract unless it is either expressly so provided in the contract, or the circumstances of the case are such as to show that time was a matter of vital importance.

207. DESTRUCTION OF PREMISES.—Where personal property is destroyed which the

owner has contracted to sell, the loss is the seller's, provided the title is still in him, and the buyer has committed no default; but in most jurisdictions if real estate is similarly destroyed, the buyer must nevertheless pay the price. If a house on the premises has burned between the time of the contract and the time for its performance without fault of the seller, the seller can compel the buyer to accept a deed of the land without the house and pay the full price. This rule has been much criticized, and it is not universally in force; for example, it is not the law of Massachusetts. In some other States the loss will not fall upon the buyer unless possession of the premises had been delivered to him under the contract, but in New York, and probably a majority of the United States, even though the seller still has possession, as well as title, the risk of accidental loss rests upon the buyer. Where risk of destruction of the premises is thrown on the buyer immediately after he has made a contract to purchase, it is of obvious importance that he should immediately insure the premises. The insurance of the seller unless transferred to him at that time with the company's assent, will not protect the buyer. Insurance is a contract of personal indemnity, and the seller's insurance only protects the seller's interest. The result is that if the premises are destroyed, the insurance company will not be obliged to pay the seller his insurance, since he can recover

from the buyer, and even if it were paid to the seller, the buyer could not claim the benefit of it.

208. SPECIFIC PERFORMANCE.—In addition to the ordinary remedy for a breach of contract, namely an action at law for damages, another remedy, that of specific performance, is permitted in the case of contracts for the sale of land; that is, the court will actually compel one who has contracted to sell land to make a conveyance thereof on receiving the agreed price and will similarly compel one who has contracted to buy to pay the agreed price on receiving a deed of the premises. Specific performance of such contracts is granted on the theory that damages are an inadequate remedy, and that the nature of the situation is such that it is possible to compel the actual performance of the contract. In contracts for the sale of personal property damages are generally considered adequate, but contracts for the sale of a painting or a race horse would be specifically enforced. Sometimes the seller is unable fully to perform his agreed contract. He may not be able to give a title free from encumbrances, or he may have committed waste of the premises. In such a case though the buyer need not carry out the contract unless he wishes, he can if he chooses get a conveyance decreed to him and an allowance deducted from the price commensurate to the injury caused by the encumbrance or waste. Specific performance will be granted not only against the seller, but if the seller in violation of his

contract has conveyed the land to a third person who had notice of the contract or who did not give value in exchange for the land, the court will compel the grantee of the premises to convey them to the person who had the original contract to buy. If, however, one who has agreed to sell the premises actually sells and conveys them to another who is a purchaser for value without notice of the prior contract, such a purchaser gets an indefeasible title, and the person having the prior contract to buy must resort for his only relief to an action for damages against the seller. For this reason it is important to record a contract to buy or sell. This record operates as notice to all the world, and no purchaser subsequent to the record will have the rights of a purchaser for value without notice.

209. VENDOR'S LIEN.—In some States a seller of land who has not been paid the price is entitled to what is called a vendor's lien on the land. This enables him to compel a sale of the property to satisfy his claim for the purchase money unless the land has been conveyed, before proceedings are brought to enforce the lien, to a purchaser for value without notice that the original vendor is still unpaid. In many States, however, the seller has no vendor's lien and must take a mortgage back for any unpaid portion of the purchase price if he desires security for its payment.

CHAPTER XI

Mortgages and Similar Transactions

210. DEFINITION OF MORTGAGE.—A mortgage is a transfer of property to a creditor to secure a debt. Unless there is a debt there can be no mortgage, and the original idea of a mortgage, still preserved in the forms of conveyance in many States, is that the mortgagor or debtor transfers the title to the mortgagee or creditor. In popular understanding the mortgagor owns the mortgaged premises but the mortgagee will take or sell them if the debt is in default. The theory of the common law, however, was that the mortgagee became the owner of the premises as soon as the mortgage was made, but that the mortgagor was entitled to reacquire the ownership by payment of the debt at maturity. Indeed, early mortgages were often made by two separate instruments: (1) an absolute deed of conveyance to the mortgagee, and (2) an instrument called a defeasance which provided that on payment of the amount of the debt on a given day, the property should revest in the mortgagor.

211. MODERN AMERICAN MORTGAGES.—At the present day in many jurisdictions a mortgage still remains both in the form of the instrument and in the legal conception of the rights of the parties fundamentally, the same as under the

early doctrines just outlined. In other jurisdictions, of which New York may be taken as a typical State, the theory is no longer that the mortgagee has title to the property, but that he has only a lien on it, which he may enforce if the debt is not paid. The difference in actual results under the two theories, however, is less than might be supposed. Where the mortgagee is still regarded as having the title, his power to make use of that title is limited so that he can only make use of it for the purpose of securing payment of what is due him. On the other hand where the mortgagee is regarded as having only a lien, the lien is a legal right against the estate which enables the creditor to enforce his claim against it in practically the same way which he would do were he the owner.

212. COVENANTS AND STIPULATIONS. —A mortgage of real estate ordinarily contains the same covenants of warranty as a warranty deed of real estate. Where a mortgage still has its common law effect of transferring title to the mortgagee, it is essential that the mortgage should contain a provision that until default the mortgagor shall be entitled to the possession of the premises. Covenants in regard to the payment of taxes by the mortgagor and the keeping of the premises insured for a certain amount, are usual and important provisions. There is also commonly contained in a mortgage a power of sale, that is an authority or agency given to the mortgagee to sell the premises

free of the mortgagor's right of redemption in case default of payment is made, or in case such default continues for a certain specified time. In all States printed forms of mortgages are ordinarily used. These forms are prepared with care to suit the requirements of local law; and if you are sure that the printed form is prepared and sold for use in the State where the mortgaged land is situated, you may feel satisfied that the terms of the instrument are suitable to protect the rights of both parties.

213. EXECUTION AND RECORD OF MORTGAGE.—A mortgage of real estate must everywhere be executed with the same formality that is necessary for an ordinary deed of conveyance. Different forms are in use in different States, and it is always desirable to use the form of mortgage customary in the State where the land lies. It is important to ascertain whether a seal is necessary in that State, and the instrument must ordinarily be acknowledged before a notary public having a seal, or before a commissioner of deeds for the State in which the land lies. There is in every State a recording act by virtue of which unrecorded mortgages are made invalid against subsequent purchasers and sometimes against attaching creditors. Though an unrecorded mortgage is as between the parties as effective as if recorded, it is of vital importance promptly to record every mortgage in the Registry of Deeds in the county where the land lies.

Where a mortgage is executed by an agent or by a corporation, it is essential that the agent or corporate officer have authority to act. In the case of a corporation it is necessary both that the corporation have power to make the mortgage in question and also that the particular officer or officers who attempt to exercise the power are authorized so to do. The principles here involved, however, are not different from those generally governing the acts of agents and corporations. The same may be said in regard to mortgages by husband or wife, by a partnership, or by trustees. In the case of mortgages executed by any such person it is necessary to take special precautions. A mortgage by husband or wife should generally be also executed by the other. A mortgage by a partnership should be executed in the same form in which the title is held by the partnership, and if the title is held by less than all the partners, it is desirable that the other partners should either express their assent to the transaction in the deed itself, or in a separate instrument executed with the same formality.

Any kind of interest in real estate may be mortgaged and mortgages of property not yet acquired by the mortgagor have generally been held to attach to the property when acquired by the mortgagor, and then to give the mortgagee as full a right as if the mortgagor had owned the premises at the time he purported to mortgage them.

The description of land in a mortgage should

have the same exactness as is necessary in a deed. Unlike deeds mortgages ordinarily state their consideration and must of course state the indebtedness which they are given to secure. A mortgage may be given to secure a past debt if the mortgagor, when he makes the mortgage, is solvent. If he is then insolvent, to give such a mortgage would be a preference which is an act of bankruptcy and subject the mortgagor to possible bankruptcy proceedings. If the mortgagee in such a case had reasonable cause to believe that the mortgagor was insolvent, the mortgage could also be set aside by a trustee in bankruptcy.

214. EQUITY OF REDEMPTION.—By the terms of the mortgage the mortgagor's right is ordinarily made dependent on payment of the debt on a fixed day, or of instalments on fixed days. A day thus fixed in the mortgage is sometimes called the "law day." According to the terms of the instrument the only way in which the mortgagor can be revested with title to the property is by complying with the express terms of the mortgage and paying the debt on the law day. The result of this provision if enforced would be that if the debt is not paid exactly when it was due, the mortgagee remains the absolute owner of the mortgaged premises. Courts of equity, however, long ago limited the mortgagee's right, holding that the real object of the transaction is to secure a debt and that if the mortgagee obtains his debt and interest

he ought to be satisfied. Accordingly if the mortgagor was in default in the payment of the debt, he was allowed to redeem the property by payment of the debt and interest until the time of tender. If the mortgagee refused to accept his debt and interest, the mortgagor could bring a suit in equity to redeem the property and the court would order the reconveyance to him of the property on payment of the debt. Because of this right on the part of the mortgagor, his interest in the property came to be called an equity of redemption, and it is often so called at the present day. The position taken by courts of equity permitting redemption might work a hardship on the mortgagee because he could never feel sure of his title to the property, however long the debt might remain unpaid. This difficulty was met by allowing the mortgagee to bring a suit to foreclose the debtor's right of redemption. We speak of foreclosing a mortgage, but, strictly, it is the debtor's right to redeem which is foreclosed. When such a suit of foreclosure was brought equity would fix a time within which the debtor might redeem the premises by paying the debt and interest, and then the decree provided that if the debtor failed to pay within the named period, his right of redemption should be forever foreclosed. At the present time there are in practically all jurisdictions statutory rules in regard to the foreclosure of mortgages of which we shall presently speak, but it is important to remember the fundamental nature of

the mortgage transaction, and the original remedies of redemption and foreclosure.

215. A RECONVEYANCE IS NOT NECESSARY ON PAYMENT OF THE MORTGAGE.—If a mortgage is regarded as a mere lien to secure a debt, it is obvious that a payment of the debt discharges the lien, and the title already vested in the mortgagor becomes free from any incumbrance. On the theory of the common law, though the title passed to the mortgagee, it was subject to a conditior subsequent which would revest the title in the mortgagor if payment of the debt was made at maturity. By mere operation of law, therefore, payment of the mortgage when due revested title in the mortgagor without reconveyance. After a default, however, a subsequent payment is not strictly a performance of the condition upon which the mortgaged deed provided that title should revest. Accordingly a reconveyance was necessary in such a case at common law, but at the present day it is generally not requisite even in case of payment after default.

216. THE MORTGAGOR IS LIABLE AS A DEBTOR.—The mortgagor is bound as a debtor ordinarily by a bond or promissory note in which he expressly agrees to pay the amount of his debt. It is perfectly possible that the debt secured by the mortgage should not be represented by such an instrument, but should rest merely in oral agreement or should be contained in a covenant in the mort-

gaged deed itself, but it is usual and desirable to have a separate obligation. The fact that the debtor has given the mortgage does not in any way limit the rights of the mortgagee as an ordinary creditor. He may sue on the mortgage debt when it is due, in the same manner as if there were no mortgage. It is his option whether he will foreclose the mortgage as a means of collecting his claim or whether he will get judgment on the debt and seek to collect it in the same way as an ordinary judgment creditor. This rule is changed by statute in California and one or two other States where by statute the mortgagee is required to realize from the mortgaged property what he can before seeking a personal judgment against the mortgagor. In many jurisdictions the creditor may in a single proceeding obtain foreclosure of the mortgagor's rights by sale of the property, and a personal judgment against the mortgagor for any deficiency which the proceeds of the property may leave. This is called a deficiency judgment.

217. RIGHTS OF MORTGAGOR AND MORTGAGEE IN MORTGAGED LAND.—Even though the mortgagor is regarded by the law as having no longer the legal title on the premises, but only an equity of redemption, his interest is regarded as real estate and descends on his death according to the laws governing real estate. The mortgagee's interest on the other hand is regarded as personal property since the debt which the mort-

gagee is intended to secure is personal property, and even a legal title to the real estate held by the mortgagee is held merely for security, and is an incident to the debt. So the mortgagor's interest in mortgaged property is subject to be seized on execution by his creditors while the mortgagee's interest can not be so seized. The mortgagee's creditors must reach his interest by means appropriate to realize upon the debt, not upon the land. The mortgagor's interest being regarded as real estate will give rise to the same estates of dower in favor of the wife of the deceased mortgagor or curtesy in favor of the husband of a deceased mortgagor as are allowed by the law in place of real estate generally. The mortgagor may, while in possession, deal with the property in any way in which an owner may, except that he will not be permitted to imperil the mortgagee's security by any kind of waste. The mortgagor may, subject to the mortgage, lease, sell or devise it. He may collect the rents and profits and use them as his as long as he is in possession. Where, however, the mortgagee is regarded as having a legal title to the premises, he may eject the mortgagor at any time from possession, even though the mortgage is not due, unless prohibited by statute or by the express terms of the mortgaged deed. In fact he usually is so prohibited. Even when not so prohibited, it is not always well for a mortgagee to take possession because, if he does so, he is bound to account not only for all profits actually received from the

premises, but also for all that might have been received. He becomes liable for any waste of the premises or any failure to deal with them in a reasonably prudent manner.

218. SALE BY MORTGAGEE OR MORTGAGOR OF REAL ESTATE.—Either the mortgagee or the mortgagor may assign his interest. The mortgagee in assigning his interest is in legal contemplation doing two things: (1) assigning the debt; (2) assigning the title or lien which he holds on the mortgagor's real estate as security for the debt. As to the assignment of the debt, the matter is governed by the same principles as govern the assignment of choses in action generally. That is, if the mortgaged debt is represented by a negotiable instrument, the instrument may be negotiated to the purchaser in the ordinary way, and with the ordinary effects of such instruments. If the mortgaged debt is not represented by a negotiable instrument, the assignment of the debt is an assignment of a chose in action. Where the common law view of mortgage still prevails, that the mortgagee has the legal title, he can only transfer it to an assignee by a deed executed by the same formalities necessary for the transfers of real estate. As, however, the law recognizes that it is the debt which is the essential feature of the relation between mortgagor and mortgagee, and that the mortgaged estate is held merely as security for a debt, a valid assignment of the debt is held to make the assignee

equitably entitled to the mortgaged property as security. And in effect, one who obtains the mortgage debt will secure the benefit of the mortgaged property even though the local law regards a mortgagee as having a legal title. Where the mortgagee is regarded as having merely a lien, the assignment of the debt involves a transfer of the lien.

If the mortgagor wishes to convey his interest he transfers the estate by deed exactly as if it were unmortgaged, except that the conveyance is stated to be subject to a specified mortgage, and it is sometimes added "which the grantor assumes and agrees to pay." It is desirable for the seller that the grantee shall assume and agree to pay the mortgage while it is desirable for the buyer that he shall buy the premises merely subject to the mortgage without assuming it. The difference between the two transactions is this: In either event the grantee receives the promises burdened by a mortgage, the amount of which will be deducted from the consideration paid as the agreed value of the premises. In either event if the debt is unpaid the mortgagee will foreclose and the grantee will lose the premises. In order to save them he will have to pay the mortgage if the grantee does not.

The distinction is only seriously important when the mortgaged premises are worth less than the amount of the mortgage. In that event the mortgagee will be entitled to a deficiency judgment against the mortgagor. The mortgagor was the

original debtor and cannot escape from his obligation to the mortgagee without the latter's assent. If the mortgagor is forced to pay, he cannot recover the amount from his grantee unless the latter assumed and agreed to pay the mortgage. If, however, the grantee did make such assumption, he will ultimately have to pay the deficiency. If the mortgagee without foreclosing the property should sue the mortgagor directly on the debt, the latter would be compelled to pay. Even if the sale to the mortgagor's grantee had been made merely subject to the mortgage, the mortgagor on paying the debt would be subrogated to the mortgage and would himself be enabled to foreclose the property. But if the property failed to realize enough to reimburse him for the payment of the debt, he would lose this deficiency unless the grantee had assumed and agreed to pay the mortgage. Whether the mortgagee may sue directly a grantee of mortgaged premises who has assumed and agreed to pay the mortgage, is a question which has been much litigated; but it is now held almost everywhere that the mortgagee may do so. Sometimes a succession of grantees, each in turn on buying the premises, assumes and agrees to pay a certain mortgage. The mortgagee in such a case is generally allowed to recover from any one of these grantees so far as is necessary to satisfy his claim; but the ultimate liability will rest upon the last purchaser who has assumed the debt. As against a grantee who has not

assumed the debt, the mortgagee has no rights. He can deprive such a purchaser of his land so far as is necessary to collect the debt, but he cannot hold him personally liable.

219. FORECLOSURE OF REAL ESTATE MORTGAGES.—According to the original theory of the law, the mortgagee became the absolute owner of the mortgaged premises by the failure of the mortgagor to pay the debt when due, and by the foreclosure or termination of the mortgagor's right of redemption. Foreclosure of this character is still possible in a few States, but in most States it has been wholly abolished, and everywhere the ordinary method of foreclosure is by sale of the mortgaged property. Frequently the sale is made by virtue of an authority or power of sale given in the mortgage itself, but sometimes it is made under authority of a decree of court in foreclosure proceedings. Where a mortgage contains a power to the mortgagee to sell on default of the mortgagor, he is acting not simply on his own behalf but as agent for the mortgagor in transferring title to the property. The proceeds will be applied first to the payment of the debt with interest and the expenses of the sale. Any surplus will be held by the mortgagee in trust for the mortgagor and must be paid over to the latter. The situation is entirely analogous to that created by a collateral note where stock or other personal property is transferred as collateral to secure a debt. The statutes of all States con-

tain regulations in regard to the foreclosure of mortgages, which must be observed. They are aimed generally to protect the mortgagor from forfeiture of his property to any greater extent than is necessary to insure the payment of the mortgage debt. In any case of foreclosure the local statute and practice must be consulted.

220. DEEDS OF TRUST.—In some States what are called deeds of trust have been largely substituted for mortgages. The temptation to make such a substitution is greatest in jurisdictions which refuse to recognize the mortgagee as the legal owner of the premises. If the law denies the mortgagee this recognition, he can by insisting as a condition of his loan that the premises shall be conveyed to a third person as trustee, achieve the result that the mortgagor at least is no longer the legal owner of the premises. Essentially the situation is the same under a deed of trust as under a common law mortgage. In both cases the legal title is held merely to secure the debt, and the court will secure to the debtor all the value of the property which can be realized from its sale over and above the amount of the debt. If the debt is paid of course the debtor is entitled to the return of the security whether it is real estate or personalty, and whether held directly by the creditor or by a third person as trustee.

221. CONDITIONAL SALES.—Certain transactions where personal property is held as security which are somewhat analogous to mortgages and

which are very common, may now be referred to. They may be classed thus: conditional sales, consignments, leases and chattel mortgages. A conditional sale, as that term is commonly used, is a transfer of the possession of property under an agreement to sell, the seller expressly retaining the title. Here we have possession and title divided. If it were not for the express agreement that title should remain in the seller, the delivery of the goods to the buyer with his agreement to pay for them would indicate a transfer of title to the buyer. The purpose of the seller in making a conditional sale is to retain security for the price which the buyer cannot pay at once. Conditional sales are most common in regard to furniture and machinery of various kinds. Creditors of the buyer naturally suppose that the goods in his possession are his, and it is to avoid deception, or possible deception, that most States require the record of the conditional sale, so that creditors and everybody can see that, although the buyer seems to be owner of this property, he is not so in reality. But in Massachusetts record is not required, and conditional sales, other than those of household furniture, need not even be in writing. The seller is secured by this sort of bargain in several ways. If the buyer does not pay the price when it is due, the seller can take the goods back. They are his goods and therefore he can reclaim them. Or the seller may conclude that it is better to sue for the price, and may decide

to let the buyer keep the goods and himself collect a judgment for the price by levying on any property the buyer may have, including that which was conditionally bought. Even though the buyer has paid a large part of the price of the goods, the seller may, nevertheless, reclaim the goods. The seller's course will be dictated largely by how much of the price has been paid. If a large part has been paid the seller will very likely prefer to reclaim the goods unless they are household furniture. Why, it may be asked, does a buyer enter into a conditional sale, which is rather a poor bargain as far as he is concerned. The reason, of course, is that he cannot pay cash and he wants the use of the goods at once, and the conditional sale enables him to get them. By statute in some jurisdictions the conditional buyer is protected after he has paid a considerable portion of the price; either by extending the time within which he may pay the balance due or by requiring a sale of the goods and the return to the buyer of any surplus.

222. CONSIGNMENTS.—Now, how does a consignment differ from a conditional sale? When goods are sent or consigned it means that the person to whom they are sent is agent for the person who sends them. The consignment is like the conditional sale in this respect, that the person who has possession of the goods has not the title. The consignment differs vitally from a conditional sale in this respect, however, that the consignee is not a

debtor for the price. If the consignee sells the goods, then he, of course, must turn over the price to the consignor less such commission as he takes, or if the transaction was not on commission, then the consignee must pay to the consignor the price it was bargained the consignor should receive. But until the goods are resold they remain the consignor's and at his risk. If goods conditionally sold are destroyed the conditional buyer must, nevertheless, pay for them. They are at his risk and he is an absolute debtor for the price; but the consignee merely holds the goods as agent until a purchase takes place.

223. LEASES OF CHATTELS.—Sometimes goods are leased. Here, again, we have the same point of similarity, that the person who has possession of the goods is not the owner. The lessee, like a consignee, is not a debtor for the price; he is debtor for rent, but he is not debtor for price of the goods. Often leases contain an option to purchase, and a lease with an option to purchase is used by piano dealers and others as an alternative mode of dealing with customers unable to pay cash, instead of a conditional sale; but it is not the same thing, for if a piano were destroyed without fault of either party after it had been leased with an option to purchase, the loss would be on the seller. If the option to pay had been exercised, of course the loss would be on the buyer.

224. CHATTEL MORTGAGES.—The goods

are here owned originally by the mortgagor, and they ordinarily remain in his possession after he has transferred them by the mortgage. The fundamental principles governing chattel mortgages are the same as those which govern mortgages of real estate. Chattel mortgages must be in writing and recorded, or the mortgaged property must be delivered to the mortgagee; otherwise they are invalid against the creditors or trustee in bankruptcy of the mortgagor; that is, one may mortgage his chattels, either by delivering them to the mortgagee or by making a writing and having that recorded. Even without record or delivery it is good between the parties, but it is not good in case of bankruptcy against the trustee in bankruptcy of the mortgagor, nor is it good against attaching creditors if there is no bankruptcy.

225. MORTGAGES OF FUTURE GOODS.—An agreement is sometimes made to make a mortgage of goods which do not at the time exist, or are not at the time defined. This is especially common in regard to a stock of goods. A wants to borrow money on his stock of goods in his shop. That may be worth $25,000 and A has not capital enough to get along without mortgaging it. Of course, he can mortgage the existing stock of goods without difficulty, but the trouble is he wants to keep on doing business, and sell in regular course of business the mortgaged stock of goods. That, too, would be easy enough if the mortgagee were willing to agree

to it, but the mortgagee is not willing to unless equal security is substituted for any goods that are sold. What they would like to provide is that the mortgagor shall have power to sell the existing goods if he chooses in the ordinary course of business, provided he always keeps a stock of goods on hand equal to that on hand at the time of the mortgage, the idea being that as one thing is released from the lien of the mortgage other things shall keep coming under it. It is not an unreasonable transaction from a business standpoint, but the law generally does not allow it validity except to this extent. It is valid as between the parties so far as to give the mortgagee a power at any time to take possession, and when he does take possession the mortgage is valid as to the goods of which he takes possession against creditors or anybody else. The mortgagee may thus take possession right up to the time of the mortgagor's bankruptcy or at any time prior to actual seizure of the stock of goods on an attachment. This gives the mortgagee some security if the mortgagor will be good enough to give him a hint when it is wise for him to take possession, because, as the mortgagee can take possession just before bankruptcy or just before an attachment, the mortgagee will be protected. But, of course, there is a chance that the mortgagee may not get the goods, and therefore this form of security in most States is not now advised, although it has been much attempted in the past. In some

States, however, such a mortgage gives a right against goods afterwards acquired which is superior to that of attaching creditors or of a trustee in bankruptcy even though the mortgagee does not take possession.

226. PROCEDURE IN ISSUING BONDS.—It is sometimes difficult for the investor fully to appreciate the vast amount of detail work involved in the bringing out of a new bond issue. Before the investment banker underwrites the issue, or makes his purchase from the corporation—before the bonds are offered to the public—there is always a painstaking and minute investigation of the new security from many different viewpoints, made by and in behalf of the banker. The investor can never know from the banker's printed circular descriptive of the issue the great amount of original work which underlies it and of which it is a meager reflection. The circular is a summary of the banker's investigation; it contains the salient features of the issue and of the issuing corporation, reduced to terms that are intelligible to the average layman. It is a statement of the principal facts upon which the banker was induced to take up the business and upon which he also bases his recommendation of the security to his clients.

227. WHAT IS A BOND?—This can be explained best by comparing it with a real estate bond and mortgage, the nature of which has already been discussed. When money is

loaned on real estate, the mortgagor, or the one who borrows, executes two papers in favor of the mortgagee, or the lender. The first is either a promissory note or a bond. The bond is a sealed writing whereby the borrower binds himself, his heirs, administrators or executors, or assigns, to pay the lender a given sum of money at a specified time, together with interest. The second paper given as security for the note or bond, is a mortgage, which conveys the title to the property to the lender, with the provision, however, that if the borrower satisfies the conditions imposed in the bond—that is, the payment of a certain sum of money at a given time, together with interest as agreed—this conveyance is to be held null and void.

228. WHAT IS A CORPORATION INDENTURE?—The indenture is a more lengthy instrument than the bond, and, as will be noted, it is called an "indenture" and not a "mortgage." The mortgage strictly is only that portion of the indenture whereby the property is conveyed or deeded to the mortgagee with the provision that the deed so given is to be held null and void in the event that the conditions named in the bond are faithfully carried out. The indenture is broader than the mortgage; it contains provisions other than those bearing directly on the mortgage. An indenture is a sealed agreement between two or more parties and any number of provisions may be inserted in it, in addition to the mortgage clauses, as may be deemed

necessary or desirable. It is always possible for the individual to obtain a loan secured by a lien on his property, provided the security is good and considered ample. If, however, his property was of so great value that he desired to obtain a loan of several millions of dollars, he would find it difficult, or even impossible, to find any one person willing to lend him so large an amount. If, however, the borrower could find a number of persons who could and would jointly contribute enough money to equal the amount of the loan, he could divide this total amount into equal parts and each lender could have such a proportionate interest as might be desired. This, then, is the case with large corporations, which are legalized persons. Owing to the fact that the holders of the bonds have only a fractional interest in the loan and therefore in any property that may be pledged to secure it, it is impossible to create separate mortgages in favor of the individual bondholders on any particular part of the property. No portion of the property can be specifically designated—the interests of the bondholders are in common. For this reason and others corporations are obliged to create what is known as a Mortgage Deed of Trust—making the mortgage to secure the many bonds in favor of some responsible individual or trust company, who holds it on behalf of the various bondholders in accordance with the definite terms of the trust and who is therefore known as the Trustee. The

indenture of the corporation must in addition to covering the mortgage, contain other related and necessary covenants, especially as to the trust that must be created. As there are so many covenants or provisions necessary in order to fully protect all interests concerned the corporation indenture becomes bulky, but its form in substance is not very different from that of the bond and mortgage of the individual which we have already analyzed and which for this reason it is well for us to keep in mind as we follow the corporation indenture.

229. ANALYSIS OF INDENTURES.—The indenture, or agreement, must of necessity be made between certain parties, the mortgagor or the corporation and the mortgagee, in this case the Trustee who holds the security given in trust for the various bondholders. It is, therefore, proper that we recite at the very beginning of the indenture the parties in interest, giving their legal residence, or as in the case of corporations the names of the States wherein they are incorporated. It is quite essential that we know in what State a corporation was incorporated as its rights and privileges are determined by the statutes of the State which created it and by the charter which has been granted to it. What are our reasons for creating the indenture? The very first premise is that the corporation is legally able to borrow money by law. If it did not have this right we could proceed no further. To borrow money and mortgage or

pledge property as security therefor is a common law right of corporations, but the amount which may be borrowed is sometimes limited by State statutes. In the event that the corporation desired to borrow in excess of the limitation additional capital stock is sometimes authorized thereby creating a larger basis for borrowing. If this premise is not incorporated its omission does not affect the status of the indenture, but it is generally placed, as many other premises are, in the indenture, for the sake of logic, and to show that the matter has been considered, and that the fact is admitted by the parties to the indenture. The purpose for which the bonds are to be issued is sometimes duly set forth, as for instance, to refund certain maturing obligations, to construct a certain extension, to build new terminals, etc. While the purpose may not always be mentioned in the indenture, nevertheless it must accord with the charter of the corporation and the laws of the State. The company cannot exceed the powers that have been granted to it. We next want to know whether the authority to borrow money and issue its bonds therefor has been obtained in lawful manner. Provisions covering the manner of securing this authority will be found in the by-laws of the corporation and the counsel must examine this matter carefully in order to see whether all legal formalities have been strictly observed and the resolutions in proper order. There are certain essential facts that must be stated in the

bonds themselves and which are elaborated in the covenants of the indenture. These facts are embodied in the resolutions of the Board of Directors and of the stockholders and are, therefore, incorporated in the premises of the indenture. These facts include the total amount of bonds authorized, title, denomination, form, date of issue and maturity, rate of interest and where payable. In order that there may be uniformity in the wording and form of the bonds so that no one holder will perchance receive an undue advantage over any other bondholder, the form of the bond, its coupons and trustee's certificate must be duly set forth in the indenture.

CHAPTER XII

Transfer of Stock

230. UNIFORM TRANSFER OF STOCK ACT.—Turn now to an entirely different matter, the transfer of stock. A stock certificate is one of the quasi-negotiable instruments of commerce, at common law not fully negotiable like bills and notes, but, nevertheless, having some of the attributes of negotiability, especially in States where what is called the Uniform Transfer of Stock Act has been enacted. This statute applies only to corporations of those States which have passed the statute. These States are at present Louisiana, Maryland, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Wisconsin.

231. TWO METHODS OF TRANSFERRING STOCK.—Stock may be transferred in two ways: first, by delivery of the certificate with the indorsement upon it of the owner of the stock, indicating that he assigns or authorizes the assignment of the stock, and second, by delivery of the certificate, with a separate document of assignment attached stating that the owner of the certificate assigns or authorizes the transfer of the stock. This second method is not so completely good as the first, where the assignment is on the certificate itself, because if for any reason the separate document should become dissociated from the certificate, the transferee's

right would not be apparent, and therefore the Transfer of Stock Act provides that if a purchaser should get possession of the stock certificate with an indorsement upon it, he would take precedence over even a prior assignee who had a separate paper assigning to him the certificate. Of course, after the transfer is duly registered on the books of the company, then it makes no difference whether that transfer was secured by means of a separate power or assignment or by means of one written on the certificate itself.

232. EFFECT OF TRANSFER ON THE BOOKS OF THE COMPANY.—What is the effect of transfer on the books of the company? Under the common law, stock was originally transferable just like any intangible right, merely by agreement of the parties, to which requirement was added, as a necessity when stock certificates became common, the delivery of the certificate itself. But it was convenient for the company to know who was owner of stock. It was inconvenient to have stockholders buy and sell without any notice to the company, and therefore a common by-law was that stock should be transferred only on the books of the company. The Uniform Transfer of Stock Act goes back partially to the old rule, since the transfer of the certificate with the indorsement or separate assignment is what transfers the stock, not the transfer on the books of the company; but in order that the corporation may not be inconvenienced it is pro-

vided that the corporation shall have the right to pay dividends to any one who is apparently owner because registered on the books of the company, and also such a person shall have the right to vote. The best analogy that can be suggested for the importance of the books of the company in stock transfer is the registry of deeds in the transfer of real estate. It is the deed, not the record of it, which creates a title, but an unrecorded deed may be defeated by creditors or purchasers without notice, so that to protect himself fully the owner of land is obliged to record his deed.

233. OWNERSHIP OF STOCK, INDIVIDUALLY, IN COMMON, JOINTLY AND BY FIDUCIARIES.—Now stock may be owned by a man individually, it may be owned by several persons in common, or it may be owned by several persons jointly, or it may be owned by a person in a fiduciary capacity, as trustee, executor or guardian. What is the difference, may be asked, between the case of ownership of stock by several persons in common and ownership by several persons jointly. The common law drew this distinction between joint right and rights merely held in common; that a joint right survived to the survivors when one of them died, whereas a right held in common passed, on the death of one of the owners, pro rata to the personal representatives of the deceased. Therefore if A, B and C own stock jointly, when C dies A and B are the owners. If A, B and C own the stock

in common, A, B and the executors of C would own it on the death of C. Generally where several persons own a right now, they own it in common, but there are two notable exceptions—the case of partnerships and the case of trustees. Stock held in the name of A, B and C, when A, B and C are either partners or trustees, will pass to A and B on the death of C. C's executor will not have to join in the transfer.

234. DIFFICULTIES IN TRANSFER AFFECT PURCHASER AND ALSO CORPORATION.—Now the difficulties in the transfer of stock may be looked at (1) from the standpoint of a purchaser of the stock, including within the name of purchaser one who lends money on the stock as well as one who buys it, and (2) from the standpoint of the corporation whose duty it is to transfer the stock on its books. Generally the difficulties which confront the purchaser are the same which confront the corporation when it is asked to transfer. If the purchaser should get a defective right when he bought, then the corporation, if it should transfer, would generally get into trouble also.

235. LEGAL AND EQUITABLE DIFFICULTIES IN TRANSFERS.—Let us follow this out in the main difficulties which arise, and these difficulties may be divided into legal and equitable difficultes; that is, by legal difficulties are meant cases where the purchaser will not get a good legal title. By equitable difficulties, cases where the purchaser

will get a good legal title but it will be subject to an equitable right in favor of some other person. The person who has an equitable right can not reclaim the stock from one who is, or succeeds to the rights of, a bona fide purchaser for value without notice.

236. LEGAL DIFFICULTIES — FORGED CERTIFICATE.—And first, in regard to legal difficulties. The certificate of stock may be forged. The purchaser of a forged certificate of stock, of course, gets nothing in the way of stock. He does get this right, that he may sue the person who sold him the stock on an implied warranty of genuineness. Analogous to the situation of the purchaser is the situation of the corporation if it should transfer stock on having handed to it a forged certificate with the request for a transfer. If the corporation should issue a new certificate of stock instead of that forged one, a person who took the new certificate, even though he was a bona fide purchaser for value, would not get any stock in the corporation, if all authorized stock had previously been issued. The corporation has no power to overissue stock; it cannot emit any more even if it tries to, and therefore the purchaser gets no stock. He does, however, get a right against the corporation. The corporation has issued what purports to be new stock to him, or if he is a remote purchaser he has paid for stock in reliance on a certificate which the corporation has issued. The corporation is estopped, as the legal phrase is, to deny the validity of that certificate as

against one who has thus relied on its acts. The result is that the corporation is bound to pay to him value equivalent to that of real stock, because the corporation has put out something which seems to be good stock, and owing to the act of the corporation the purchaser has been deceived.

237. FORGED ASSIGNMENTS.—A second legal difficulty arises where the indorsement or assignment of the certificate is forged. Only the owner of stock can sell it. Consequently, if anybody else attempts by forgery or otherwise to make a transfer, the transfer will be ineffectual. The result will be the same as though the whole certificate were forged. The purchaser under the forged indorsement will get nothing. If the corporation relies on the forged indorsement and issues a new certificate, it will, in the same way as in the case of a new certificate issued for a wholly forged one, be liable to a purchaser for value. It is, of course, of vital importance, therefore, to make sure that indorsements are correct, and generally it is desirable to take indorsed certificates only from reliable persons. If you take such a certificate from a reliable person, even though there is no express guaranty of signatures by a brokerage house or other third person, as there often is, you will be practically safe because of the implied warranty of genuineness by the seller which applies to the indorsements on certificates as well as to cases of wholly forged certificates.

238. ASSIGNMENTS BY UNAUTHORIZED AGENT.—A third case is where the indorsement is made by an agent, and the agent has no authority to act. A corporation transferring stock should require, and a purchaser should require, the clearest evidence of an agent's authority if the signature of the transferor is made by an agent. It is not only necessary to be sure that the agent's authority originally existed, but it is necessary to be sure that his power has not been revoked, either by the death of the principal or by express revocation during his life. A question that sometimes is troublesome in regard to the agent's authority to make such an indorsement arises where the terms of the power given the agent are general; where he is authorized to do a very broad class of acts for the principal, but no specific mention is made of the particular certificate which he seeks to transfer. Such a power, if it certainly includes the transfer of that certificate, is legally good, but a corporation would object to make a transfer under a power which did not specifically mention the particular certificate, unless it was absolutely certain from its terms that this certificate in question was included.

239. LACK OF CAPACITY TO ASSIGN.—A fourth case is lack of capacity on the part of the owner of the stock to make a transfer. This lack of capacity may arise from a variety of causes, insanity or infancy, for instance. A totally insane

person is as incapable of transferring stock as of transferring other property. An infant, that is, a minor, though not wholly without capacity if not under guardianship, becomes, presumably, wholly without capacity to transfer stock if under guardianship. An elderly person under the charge of a conservator would be incapacitated to transfer his property. An infant who has had no guardian appointed, though he could make a transfer, could also, by virtue of his infant's privilege, revoke that transfer, which, therefore, would be too insecure either for a purchaser to take or for a corporation to allow. If stock is owned by an infant, a purchaser or a corporation should require that a guardian be appointed and that the transfer be made by the guardian.

240. LACK OF DELIVERY — THEFT OF CERTIFICATE.—A fifth case is where the signature on the back of the certificate of stock is genuine, but where there has been no valid delivery by the owner. This is rather a troublesome case to detect. In the case of fully negotiable instruments, like bills and notes, if the signature of an indorser is genuine, a purchaser for value of the instrument will get title even though he purchases from a thief, or though for any reason there was no intention on the part of the owner who wrote his name on the back to make a transfer of the instrument. But by the common law stock certificates were not negotiable to this extent. This case occurred in a law

office in Boston. The head of the firm rather carelessly kept "street certificates" for stock (that is, certificates made out in the name of the brokerage firm which was the former owner and indorsed in blank), not having the certificates transferred to his own name. The stock was not at the time dividend-paying, so that a transfer on the books seemed unimportant. He put the certificates into the office safe to which the office boy had access. This boy took the certificates and sold them through a broker, and the loss was not discovered for several years. After it was discovered the loss was traced by the numbers of the certificates, and action was brought against the brokers who were unfortunate enough to have taken the stock from the office clerk. Now, if the certificates had been negotiable paper, the brokers would not have been liable, but under the law then existing it seemed so probable that they were liable that they settled the case by paying more than half the value of the stock. The only thing that could have prevented their being liable was that, under the circumstances, the contention was possible that the owner of the stock had been so negligent in his dealing with the certificates as to preclude him from asserting any right. Now the Transfer of Stock Act changes the law in this respect so far as Massachusetts stock certificates are concerned. The act makes them fully negotiable, but the common law would apparently still apply to certificates of stock of corporations incorporated in

other States. And similar principles would be applicable in other States which have passed the same statute.

241. DEATH OF OWNER OF INDORSED CERTIFICATE.—A somewhat similar case is this: suppose that after the owner of stock has written his name on the back of it he dies; that is a common enough case. Many men have used their stock certificates to borrow money on, and therefore after paying the loan they have them in their possession with their signatures on the back. They put those certificates back in their safety deposit boxes. Then suppose the owner dies and an attempt is made to transfer the stock by virtue of that signature written on the certificate. That is not a valid transfer at common law. The certificate was owned only up to the time of his death by the man whose name is on the face; on his death his executor becomes the owner and the executor's signature is necessary to transfer the title, and the signature of the man himself written before his death is not effective for that purpose; and yet a purchaser may not be aware that that signature is invalid; he may not know that the man who has signed this is dead, and similarly the corporation may allow the transfer to go through in ignorance that the signer is dead. If the money which is the proceeds of the stock actually reaches the executor of the estate, of course he could not object to the validity of the transfer, and he could not object if he were in any

way a party to the transfer of the stock by means of the signature of the dead man; but if the proceeds did not get to the hands of the executor and he was in no way responsible for the transfer, he could assert that the transfer was invalid and that that stock belonged to him. This, again, is changed by the uniform law so far as applies to corporations of the States which have enacted that law. To avoid misapprehension it should be said that if an indorsed certificate has been delivered for value during his lifetime by the owner to a purchaser or lender, the death of the indorser does not impair the validity of the signature even at common law. The purchase of the stock or loan upon it gives the purchaser or lender a power, which cannot be revoked by death or otherwise.

242. BANKRUPTCY OF THE OWNER OF STOCK.—One other important case where a genuine signature of one who was the owner cannot transfer a good title is the case of bankruptcy. The federal bankruptcy law provides absolutely that title to property which a bankrupt has at the time of his bankruptcy shall be vested in his trustee. If, therefore, after A's bankruptcy, A seeks to transfer stock which he had owned, and which was in his own name, he is not the owner of the stock and has not the power to transfer it. Therefore, even a bona fide purchaser will get nothing.

243. ATTACHMENT OF STOCK.—A sixth difficulty in regard to transfer of stock is done away

with in States where the Uniform Transfer Act has been enacted, and that is attachment by a creditor of the registered owner. Such attachments created a good deal of difficulty before the passage of the act. Suppose this case: A is the owner on the books of the company of 100 shares of Boston & Albany stock. He knows a creditor is about to attach that stock, and in order to get ahead of the creditor he sells the stock on the exchange. If he makes the sale before the attachment, undoubtedly the sale everywhere would prevail over the subsequent attachment; but suppose the attachment preceded by a little while the sale of the stock. A still has the certificate, and brokers and purchasers are accustomed to rely on the certificate as evidence of ownership. They take the certificate and pay A money for it; then when the purchaser goes to transfer the stock he finds that an attachment had been put upon the books of the company. Where the uniform law governs the case the only way to make an attachment of stock effective is to seize the certificate itself. But in other States this difficulty may still arise of a purchaser being deceived by the certificate itself, and paying money on the faith of it when there has been an attachment levied by a creditor immediately before on the books of the company.

244. TRANSFERS BETWEEN HUSBAND AND WIFE.—One other matter of tranfser deserves attention, and that is a transfer between hus

band and wife, or wife and husband. A married woman can contract in most States as fully as a married man, but generally, though not universally, neither of them, can contract with the other or make a conveyance directly to the other. A promissory note from wife to husband, or husband to wife, or any other conveyance or transfer or contract was at common law and is still in many States invalid. A husband can, however, appoint his wife his agent, and a wife can appoint her husband her agent, and when such an agent acts, his act will be legally that of the principal, just as in any other case of agency. Accordingly, if a husband draws a check payable to his wife, though he does not become liable as drawer to his wife, and could not be sued by her if the check was not paid, the bank runs no risk in paying the check because the husband has authorized the bank to make a payment to the wife. Similarly, if a husband authorizes a corporation to transfer stock to his wife it seems that the corporation is protected, having acted under the authority of the owner, and that the wife would get a good title to the stock. This question has, however, been somewhat disputed by lawyers. Therefore it is very probable that a corporation would, as a matter of precaution, refuse to run any risk by transferring directly from husband to wife or vice versa, but would require that the transfer should be made through a third person in any State where husband and wife cannot contract with one another. So much for difficulties

arising out of defects in lack of legal title to the stock.

245. STOCK HELD IN TRUST.—Now let us consider equitable defects. Such defects chiefly arise where stock is held in trust. It would be the simplest and pleasantest thing for a corporation if it could refuse to register stock in trust at all, but it has been decided that it cannot do this, that it is bound, if requested, to register stock in favor of a trustee and issue stock to trustees. Now trustees hold under an appointment by the court. A trustee may cease to be such at any time by removal of the court as well as by death. Suppose stock in the name of D, trustee. If D has ceased to be trustee because he has been removed from office, a transfer by him will not be valid. Accordingly, it is essential for a corporation and for a purchaser to be certain, not simply that D was trustee, but that D is trustee at the time he attempts to make the transfer. We may suppose the case of a certificate which does not state that there is a trust. Not infrequently trustees, to avoid complications, do not specify in the certificate that they are trustees. If the corporation or if the purchaser of that stock has no notice that D is really holding that stock in trust, the corporation or the purchaser will have the same rights as if there were no trust. But if either the corporation or the purchaser gets notice from extrinsic sources that the stock was really held in trust, they will be bound to make sure that the sel-

ler is still the rightful trustee, in the same way as if the certificate stated that the stock was owned by D as a trustee.

246. ONE HAVING NOTICE THAT STOCK IS HELD IN TRUST MUST ASCERTAIN THE TERMS OF THE TRUST.—Even if the supposed trustee is actually the trustee he may not have power to give a good title to the stock. He has the legal title, undoubtedly, but if the certificate contains notice that he holds the legal title as trustee, every one is bound at his peril when purchasing the stock, and also the corporation is bound at its peril before it allows the transfer of the stock, to make sure that the trustee is authorized by the terms of his trust to transfer the stock.

247. A TRUSTEE HAS POWERS NECESSARY TO CARRY OUT TERMS OF TRUST.—Generally when a transfer of stock is attempted by a trustee it means that the trustee is selling the stock, though that is not necessarily the case. A trust may be terminated; that is, a trust may be created for twenty years, with directions to the trustee to transfer the trust property at the end of the twenty years to certain beneficiaries. A transfer by the trustee at the close of the twenty years to the beneficiaries would not be a sale of the stock; it would be a transfer for the purpose of carrying out the trust, and a trustee always has implied power to make any transfer of stock that is necessary to carry out the purpose of the trust.

248. A TRUSTEE HAS NO IMPLIED POWER TO SELL.—A trustee has not implied power to sell. The general duty of a trustee is to keep the property which is left to him in trust or conveyed to him in trust in its existing form, and no power is implied to change the form to something else. Accordingly, if no power to sell is in terms given in a trust created by deed or will, a corporation will require and a purchaser should require the trustee to obtain the authoity of the probate court to make the sale. Carefully drawn trusts generally contain a power for the trustee to sell if the purpose of the trust is to produce an income-bearing fund for a long period of years. For that purpose a change of investment is frequently desirable, and therefore trustees are expressly given the power. But the corporation which has issued a certificate to a trustee and a purchaser from the trustee must find out at their peril whether such a power is given.

249. A TRUSTEE HAS NO IMPLIED POWER TO PLEDGE.—Another power, and one which is not commonly given, is the power to borrow on stock, to pledge it or use it for collateral security. Such a power is not implied and is not commonly given in trust deeds or wills. Therefore, a bank or other lender should not lend on certificates of stock which are made out to the borrower as trustee, or made out to any one as trustee. Of course, it is improper, even though the trust did give power to borrow, to allow the trustee not only to borrow

money on trust securities but to use the money borrowed as part of his own assets; that is, to put it in his own general account. It is his duty to keep trust money separate, and therefore if the trustee has power to borrow he should keep the funds which he borrows earmarked as trust property; but as has been said, he will rarely have power given him expressly to borrow even for trust purposes.

250. A TRUSTEE CANNOT TRANSFER TO HIMSELF.—Suppose a trustee is by a deed or will given power to sell and he asks the corporation to make a transfer of the stock to himself. The corporation should not do it. He has power to sell to any one else but himself. A fiduciary cannot make a bargain with himself in regard to his trust property, and therefore he should not be allowed to transfer the stock to himself.

251. A TRUSTEE CANNOT DELEGATE HIS POWER TO SELL.—A trustee cannot delegate his powers, and therefore he cannot give a general power of attorney to another, to sell trust stock or any trust property whenever it may seem wise to the agent to do so. Even though the trustee has himself power to sell, he must exercise his own discretion as to the occasion when it it proper to sell.

252. PURCHASER FROM A TRUSTEE IS NOT BOUND TO SEE TO APPLICATION OF PURCHASE MONEY.—Though the corporation and though the purchaser from a trustee are bound

to see, if they have notice of the trust by the form of the certificate, that the trustee is not making an unauthorized sale, neither the purchaser nor the corporation is bound to see that the trustee does not make an improper application of the money received from sale of trust stock. In the current legal phrase, neither the purchaser nor the corporation is bound to see to the application of the trust money; but if either the purchaser or the corporation had notice of a proposed misapplication of the trust money to be received for the stock, it would be improper to allow the transfer knowing that the proceeds would be misapplied, and the corporation or the purchaser would be liable if the transfer was carried out.

253. AN EXECUTOR HAS IMPLIED POWER TO SELL.—Stock held by a guardian or by an executor is in many respects treated similarly to stock held by a trustee. There is this difference, however, in the executor's position, that as it is his duty to reduce the estate to cash he has in most, but not all, States an implied power to sell; it does not have to be given to him in the will. The will, however, may restrict an executor's right to sell certain stock, and therefore even in the case of an executor it would be proper for a corporation to make sure that the executor's power had not been restricted by the will before allowing the transfer.

254. TRANSFER BY AN EXECUTOR TO A

LEGATEE.—Generally the executor will seek to reduce the property to cash and therefore seek to transfer the stock in the estate to a purchaser, but he may try to transfer it directly to a legatee. He may himself be a legatee and endeavor to transfer to himself. Unless he is a residuary legatee or a legatee of the specific stock in question it is as improper for him to transfer to himself as for a trustee to transfer to himself. Even though the executor is a pecuniary legatee or is entitled to payment for commissions, he would have no right to take stock in lieu of such pecuniary legacy or commission, for he cannot make such a bargain with himself though he might in regard to the legacy of another. If the executor is a specific or residuary legatee the question of a right to transfer to himself is the same as to transfer to any other legatee, and that right is only subject to one qualification. Creditors of an estate have the first right; legatees do not get their legacies paid unless creditors are taken care of first. Now creditors have a fixed period from the time when executors or administrators give bonds within which to assert their claims. If they have not asserted their claims in that period the claims are barred. After that time has expired it can be known whether the assets of the estate are sufficient to pay legacies, and it is proper to allow a transfer to a legatee. Prior to that you run the risk—which may be in a particular case a very small one or it may be a very large one—that the creditors of the

estate may exhaust the assets and the legatees not be entitled to anything.

255. LOST CERTIFICATES.—Occasionally a question arises in regard to a lost certificate. The Uniform Law provides for this case in substantially the same way as the common law would deal with it if there were no statute, namely, the corporation may demand a bond to indemnify it before it issues a new certificate. This bond is essential because should the old certificate turn up and be transferred to a bona fide purchaser for value the corporation would be liable on the old certificate, and as it would also be liable to a purchaser for value of the new certificate it is necessary that it should have a bond to protect it.

256. INTERPLEADER OF SEVERAL CLAIMANTS FOR STOCK.—If there are several claimants for stock, as sometimes happens, the corporation should file a bill of interpleader, as it is called, against the several claimants, asking the court to determine which one is rightfully entitled. An instance of that kind would be where A asks a corporation to transfer stock to him, presenting a certificate indorsed by B, but B notifies the corporation that he has been defrauded out of that stock by A and that he elects to rescind the transfer to A and demands the certificate back. The corporation cannot undertake to determine which of those parties is in the right; it must ask the court to do so. Not infrequently the same situation arises in a bank

where money has been lent on stock, and notice is given to the bank not to return that security to the borrower because he obtained it fraudulently or otherwise has acted in violation of the rights of a third person in pledging it to the bank. The bank, if it is a bona fide lender, is, of course, entitled to hold the stock for its own security so far as it may be necessary to repay the loan; but perhaps the bank can get the loan repaid out of other securities unquestionably belonging to the borrower. In that event the bank should do so and then ask the court who is entitled to the stock over which the dispute arises.

257. EFFECT OF DELIVERING UNINDORSED CERTIFICATE.—In order to transfer stock, as previously said, it is necessary that the stock should be either indorsed or that on a separate paper an assignment or power to transfer should be written. What is the effect of giving a certificate without either of these formalities? It virtually protects the person who receives the certificate, for though he has not title to the stock and cannot get title without an indorsement, he has the certificate in his possession which prevents any other person from getting title; and, furthermore, he has the right to require an indorsement from the person whose indorsement is needed, provided, of course, that the holder of the certificate took it from the owner, who impliedly or expressly agreed that he should have title. If somebody not an owner of a

certificate delivered it without indorsement to a bank, and borrowed money on it, the bank would not be protected. The true owner could say, "That is mine," and take it away.

CHAPTER XIII

Carriers and Bills of Lading

258. CARRIERS WHO ARE PUBLIC SERVICE COMPANIES.—Common Carriers—that is, railroads, express companies, and any other persons or corporations who carry goods for hire and hold themselves out to the public as engaged in the business of carrying goods for anybody for hire—are engaged in a public service. A man who owns a tramp steamer and gets cargoes as he can is not engaged in a public service—he is not a common carrier or public carrier; but a person who has a line of steamers, or even one steamer, regularly engaged in plying between different places and taking goods as offered for hire, is engaged in public service.

259. DUTIES OF ONE ENGAGED IN PUBLIC SERVICE.—Now, being engaged in public service subjects a person or corporation who is so engaged to some special duties. Such a person cannot make any bargain he pleases with anybody he pleases, and refuse to make bargains with people he does not please, as an ordinary person can. It is the duty of any one engaged in a public service to give reasonable service to all who apply without discrimination and for reasonable compensation. Of course, carriers are not the only public-service corporations; electric light companies or gas companies or water companies would be other illustrations; but

common carriers, and especially railroads, are the most prominent public-service corporations.

260. RAILROAD COMMISSIONS.—Not only is there this common-law duty to serve all without discrimination and at reasonable prices, but both the State and the United States have established commissions to look after the proper performance by railroads and other carriers of their duties. The Railroad or Public Service Commission in most States has a great variety of powers for compelling railroads to give proper service. The chief function of the Federal Interstate Commerce Commission has been in regard to rates, but by recent legislation its powers have been enlarged. The Interstate Commerce Commission has the power in interstate commerce to say whether rates and practices are reasonable. The power of the Commission applies only to interstate commerce. A carrier is obliged to file with the Interstate Commerce Commission a schedule of its rates and regulations concerning rates, and is also required to post these rates publicly in its stations. If anybody objects to the rates they must make complaint before the Interstate Commerce Commission. That is the only form of redress, and sometimes not an easy one for a person who is merely interested in a single shipment, because the expense and delay of proceedings before the Interstate Commerce Commission are such as to be prohibitive, unless the complainant's financial interest in the matter were

considerable. It is common, therefore, for shippers' associations to take that sort of question up rather than leave it for individual shippers. Any contract made by a carrier for either more or less than the scheduled rate is illegal and void.

261. CARRIER'S COMMON-LAW LIABILITY FOR GOODS.—A carrier, at common law, when he receives goods for transportation is subject to a degree of liability beyond that imposed on any other person. An ordinary person who receives goods—a bailee, as he is called in law—is merely liable for the consequences of his negligence. A carrier, however, while goods are in course of transportation is liable, at common law, as an insurer against all kinds of accidents except those caused by act of God or public enemies. For instance, if goods were struck by lightning in transit that would be an act of God, and the carrier would not be liable, but if goods caught fire from any other cause, as from neglect of an outsider or the act of an incendiary, the carrier would be liable. Carriers, of course, dislike that and try to contract away their liability. They are allowed by law to do so, except that they are not allowed to contract for exemption from the consequences of their own negligence. It is largely this desire of carriers to free themselves from the extreme liability which the common law imposes on them, that induces them to give bills of lading. It is often required by law, but they are pleased to do it any way, as they can

in that way contract to exempt themselves from this extreme liability which lasts while the goods are in transit and until the consignee has had a reasonable time to remove them from the carrier's possession. If the consignee fails to remove them with reasonable promptness the carrier then becomes liable merely as a warehouseman may for its own neglect. The extreme liability of the carrier does not extend to damage caused by delay. The carrier is liable for delays in so far as they are caused by its own neglect, but otherwise is not liable. A carrier need not deliver the goods unless freight is paid, as it has a lien for freight charges.

262. THREEFOLD NATURE OF BILL OF LADING.—A bill of lading issued by a carrier for goods has a threefold character. In the first place it is a receipt. The importance of a receipt is as evidence of just what was shipped. It is important to the shipper as proof that the carrier received goods of such a quantity and of such a description in good order. It is important to the carrier as proof of the same thing, to prevent the shipper from claiming that he has shipped different kinds or quantities of goods from what the bill of lading states. The second aspect of a bill of lading is as a contract. It is not only a receipt but a contract between the parties, the shipper and the carrier. It is as a contract that the stipulations it contains for limitation of liability are important.

263. CARRIERS CAN DELIVER GOODS

ONLY TO HOLDERS OF ORDER BILLS OF LADING.—The thing that makes a bill of lading valuable to buy or lend money on is the fact that the carrier will hold the goods behind the bill of lading until the bill is itself presented and surrendered. If the carrier were to deliver the goods upon demand to anybody other than the holder of the bill of lading, it is obvious that there would not be much use in holding the bill of lading. The carriers have made a great contest on this question in the past. They have contended that they fulfill their duty if they deliver the goods to the consignee originally named in the bill of lading, whether that consignee continues to hold the documents or not. But that has been decided against them so far as order bills are concerned (that is, bills which say that the goods are deliverable not simply to a consignee but to the order of a consignee) and these order bills have printed on them the provision that the bill itself must be surrendered before the goods will be delivered.

264. CARRIERS MAY DELIVER TO CONSIGNEE OF STRAIGHT BILLS OF LADING.—In a straight or flat bill, however (that is, one without the word "order") the carrier's contention has been upheld and the carrier is allowed to deliver the goods to the consignee, even though the consignee does not present the bill of lading and for all the carrier knows is not the owner of the bill of lading or of the goods.

265. BILLS OF LADING USED TO ENABLE SELLER TO RETAIN HOLD ON GOODS.—The ways in which bills of lading may be used, and are used, in the mercantile world must be understood before the legal questions which arise can be grasped. The primary and original purpose of using bills of lading as symbols of the goods was doubtless to secure the seller in his hold on the goods until he got the price, and that is still a vital purpose in the use of bills of lading. We have seen in the case of sale of goods that unless credit is given, the delivery of the goods and the payment of the price are concurrent conditions. Now, when the parties reside at a distance there is difficulty in working out these concurrent conditions. If the seller ships the goods directly to the buyer he loses his hold on the goods, and if the buyer does not keep his agreement to pay promptly the seller will be able to do nothing about it. On the other hand, of course, the buyer does not want to pay in advance. Now, by means of bills of lading, the seller is enabled to keep his hold on the goods until he gets the price, and the buyer is enabled to acquire a hold on the goods as soon as he pays the price.

266. STRAIGHT BILLS TO BUYER GIVE THE SELLER NO HOLD ON GOODS.—The bill of lading may be used in various ways. Suppose, first, the seller when he ships the goods takes a straight bill to the buyer. That will not give the seller any hold, for the carrier will be discharged if

without demanding the surrender of the bill of lading, he delivers to the consignee named. So we may cross off that as a possible means of protecting the seller.

267. STRAIGHT BILLS TO THE SELLER.—The second possibility is for the seller to take a straight bill, naming himself as consignee as well as consignor. If that is done the buyer cannot get the goods at once. Suppose the bill of lading was sent forward, even that would not of itself enable the buyer to get the goods, if the carrier wished to be technical, since in a straight bill the goods are deliverable not to the holder of the bill, but to the consignee named therein. There would have to be attached to the bill of lading an order from the seller, who is named as consignee in the bill, directing the railroad to deliver the goods to the buyer instead of to himself, the consignee named in the bill. That would be a perfectly feasible matter, but this method is not much used, and one reason why it is not much used is because the seller frequently wants to do something else besides hold onto the goods until the buyer pays for them. He wants to get money from a bank in the meantime.

268. USE OF BILLS OF LADING BY SELLER TO OBTAIN LOANS.—The way he does it is by taking a bill of lading to the bank with a bill of exchange drawn on the buyer, and he asks the bank at his home town to discount the bill of exchange, taking as security the bill of lading. Sup-

posing his home bank does this, it then sends the draft, with bill of lading attached, to its correspondent bank in the buyer's city, where the draft is presented to the drawee, who is the buyer, and if the buyer honors the draft then he is given the bill of lading. Now, banks would not do this, ought not to do it (occasionally they have), with a straight bill, even if the bill is drawn naming the seller as consignee, for the bank when it discounts the bill of exchange and gets the bill of lading as security gets no real hold on the goods. The railroad may deliver the goods to the consignee—the seller—without ever seeing the bill of lading, and without the bank, which holds the bill of lading, ever knowing anything about it; or the railroad may deliver to the buyer or some third person on a written order signed by the consignee. In other words, the railroad does not have to hold the goods until the bill of lading, properly indorsed, is presented to it.

269. STRAIGHT BILLS OF LADING GIVE NO SECURITY TO BANK.—The first and fundamental requirement, then, for any bank which may deal with bills of lading is never to have anything to do with straight bills. They give no security. A straight bill is readily distinguishable from an order bill on railroads in most parts of the country, at least, because uniform bills of lading are now in use, and the straight bill is always white and the order bill is always yellow. In foreign bills a greater variety of forms are used, and you may have

to examine the terms of the bill before you can feel satisfied that it is of a sort that will give security. The vital words in bills of lading, as in negotiable paper, are the words, "order of" or "or order." If those are in a bill of lading it is all right as far as this matter is concerned. Therefore the third and fourth possible ways in which the seller may take the bill of lading to secure himself are the only ones which will enable him to finance the shipment at once.

270. BILLS OF LADING TO BUYER'S ORDER.—The third way which the seller may act in order to fulfill his purpose is to take an order bill of lading to the buyer's order. Although the bill of lading runs to the buyer's order, and although, therefore, title to the goods will pass to the buyer on shipment, the buyer cannot get the goods without that bill of lading. Therefore, so long as the seller hangs onto the bill of lading nobody can get the goods from the carrier, and though the seller has parted with title to the goods, since he made the bill of lading run to the buyer's order, he has retained control of possession. Though it gives a security to the seller, and would give a security to the bank if the bank discounted a bill of exchange drawn on the buyer and took this bill of lading as security, it is not a desirable method for this reason: though the buyer cannot get the goods without the bill of lading, nobody else can get the goods without a lot of trouble, unless he has not only the bill

of lading but the buyer's indorsement upon it. The bill of lading is drawn to the buyer's order, and if the buyer fails to pay and repudiates his contract, the bank or the seller will have trouble in getting back the goods. They will have to prove to the railroad that the buyer really has made default and that he no longer has any real interest in the goods.

271. BILLS OF LADING TO THE SELLER'S ORDER.—Accordingly, it is the fourth method which is in general use and which should be exclusively used. The seller takes the bill of lading to his own order and indorses it in blank; then he delivers it to his bank as security for a bill of exchange. If the bill of exchange is paid by the drawee on presentment at his city, he is given the bill of lading at once and he gets what he wants. On the other hand, if the buyer does not pay the draft on presentment, then the bank can realize on the security at once if he wants to, because it has a bill of lading in its hands indorsed by the consignee to whose order it was made out. If the bank goes back against the seller as the drawer of the draft, when he pays and takes up the bill of lading he can similarly realize on the security, or get the goods back, because he will have a bill of lading in his possession which runs to his own order.

272. BILLS OF LADING TO "ORDER NOTIFY."—A slight modification of this form of bill of lading is made in order to let the buyer know when the goods arrive. When goods arrive at their

destination it is a customary courtesy of railroads to notify the consignee, but if goods are consigned to the seller's order the man who is really trying to buy the goods gets no notice; his name does not appear on the bill of lading. To avoid that difficulty there is generally put on bills of lading, taken out to the seller's order when the goods are shipped in fulfillment of some contract or order, the words, "Notify X Y," X Y being the prospective buyer of the goods. Then when the goods arrive the railroad notifies X Y; he learns the goods are there and makes his plans accordingly. These bills of lading are often called "bills to order notify." The person who is to be notified is sometimes incorrectly called the consignee of the bill. The consignee is the person to whom the goods are deliverable, not the person who is to be notified necessarily; and where a bill is to the seller's order the goods are, by the terms of the bill of lading, deliverable to the seller and he is the consignee.

273. CROPS ARE MOVED BY USE OF BILLS OF LADING.—The various uses of bills of lading by sellers in order to insure concurrent payment by the buyer, and in order, with the aid of banks, to put themselves in funds while the goods are in transit, is a very important function of bills of lading. It is by such means the great crops of the country are moved, especially the cotton crop, which is moved almost wholly in this manner. The southern banks discount bills of exchange, which

are customarily secured by bills of lading. The New York banks rediscount these bills of exchange and draw for a great part of the price of the cotton on English bankers. This use by sellers of bills of lading, however, is not the only mercantile use of bills of lading.

274. BILLS OF LADING TO BANKER'S ORDER.—Here is another method used, especially common in foreign commerce. A merchant in Boston wants to buy a cargo of goods from Europe, but he has not the money to do it. The seller in Europe does not know him and will not give him credit, so the merchant goes to bankers who have available foreign correspondents and states his case, and if he is in good credit with the bankers they say, "Order the goods from the man in Germany of whom you were planning to order them, and tell him to make the bill of lading out to us, and draw on us or on our correspondents in Berlin or London or Paris. On receipt of those bills of lading naming us as consignee we will pay, or cause to be paid, the bills of exchange attached thereto for the price." In this way the goods are shipped directly to the banker. In the cases mentioned before, the banker took an indorsed bill of lading, but in this mode of dealing the banker is himself the consignee, and on the faith of the consignment he pays the price of the goods. Then he delivers the bill of lading, indorsed, to the buyer, his customer, on the buyer's making a settlement or giving him security.

275. SURRENDER OF BILLS OF LADING FOR TRUST RECEIPTS.—There is one method of doing business in this connection which causes some risk to the bankers who engage in it. They frequently allow their customer, the buyer, to take the bill of lading, indorsed, for the purpose of entering the goods at the Custom House, or warehousing them, or even for the purpose of selling the goods so that the buyer will be in funds to enable him to discharge his debt to the banker. The banker takes, when he does this, from the buyer to whom he delivers the indorsed bill of lading, what are called "trust receipts." These receipts state that the buyer has taken these bills of lading, that he holds them as a trustee, that they really belong to the banker, and that the buyer holds them simply for a special purpose, such as to enter them at the Custom House or to resell them and turn the proceeds over to the banker. If the buyer is honest, well and good, but if he should be financially pressed and dispose of that bill of lading, many courts at least would not protect the banker, but the bona fide purchaser. What the banker ought to do is to stamp the trust upon the bill of lading if he delivers it to the buyer. In that case any purchaser of the bill of lading would have notice of the terms of the trust.

276. CHANGE OF ROUTING.—An analogous problem also may be supposed. A bank holds a draft for collection with bill of lading attached. It sometimes allows the drawee to take

possession of the bill of lading and change the routing of the car. That is done because the buyer sometimes sells the goods before he receives them, and to save additional freight bills he changes the routing on the original bills of lading. What risk does the bank run if it allows him to have possession of the bill of lading indorsed in blank? It runs the same risk as in case of trust receipts. The fact that the purpose was to change the routing of the goods is apparently immaterial. The change of destination does not do the bank any actual harm, except that the goods will be sent to a distance. The great risk involved is in allowing a man to have possession of a document which in effect is negotiable. If the bank does not get back its bill of lading it is in a bad position. If it did get back its bill of lading it would still have its security, only it would be subject to this difficulty, that the goods instead of coming to a place where the bank could conveniently get at them, have perhaps gone to a distant city, where it would be more trouble. If, however, changing the routing and the reselling involve a surrender of the old bill to the railroad and the issuing of a new bill of lading not only on a new route but with the purchaser from the consignee, named as a new consignee, then the bank has thrown away everything, unless it actually obtains possession of the new bill, and even if it does it has only an inferior security.

277. ACCOMMODATION BILLS.—Let us

now enumerate the risks which a purchaser or a lender runs in dealing with bills of lading, even with order bills, and consider how these risks can be obviated and how far they are inherent in the nature of the business. The first risk is that the bill may have no goods behind it, because it was originally issued without any goods. It has been quite a common practice, at some points where there is competition for freight, to accommodate customers by issuing a bill of lading for goods before the goods were received. Suppose a seller in Chicago deals with a man in Boston; what the seller normally ought to do is to buy goods, and ship them, getting a bill of lading, then take the bill of lading to a bank and get money on the faith of that bill of lading. You will see that that method requires the seller to have had money or credit in the first place, in order to buy those goods to ship. It would be very much more convenient for him if he could reverse the order and get the money from the bank first, then buy the goods and then ship them; and the kindness of the railroad agent frequently has enabled him to do that. The railroad agent, trusting to the seller's word that he will ship goods tomorrow, issues a bill of lading to him for the goods which the seller promises to ship. The seller dashes around to the bank, gets money and then buys the goods and ships them. He may carry on that way of doing business a long time; no trouble occurs, nobody knows anything about it until the

seller either goes bankrupt or becomes dishonest and fails to ship the goods after he has got the bill of lading, and then somebody finds himself with a bill of lading for which no goods have ever been received. Such bills have been called "accommodation" bills of lading, issued by the railroad for the accommodation of the shipper.

278. FICTITIOUS BILLS OF LADING.—In some cases the whole transaction is a fraud. In the case we have thus far been supposing, the railroad agent believed the seller was going to ship goods, and the seller intended to do so, only he wanted the bill of lading first; but money is so easily obtained frequently on bills of lading that sometimes a shipper and a railroad agent put their heads together and say, "Let's make a few bills of lading," and as a pure fraud the agent writes bills of lading. These may be called fictitious bills. They are not exactly forgeries, you will see, since they are drawn by the regular agent of the railroad on the regular railroad form. One who took such a bill as this, however, would be protected if the carrier were liable. Railroads are generally, and other carriers are generally, financially responsible, and therefore the great question that interests the holder of such a bill is, are the railroads liable in damages because no goods are behind the bill of lading? It was held in an English case, seventy-five years ago, that a carrier was not liable on the ground that the agent who wrote the bill was acting beyond the

scope of his authority in signing a bill of lading when no goods had been received. That decision has been much criticized, and justly criticized, because the carrier has put that agent in a position to determine when bills of lading shall be issued and when not. Of course, the agent ought to exercise his choice properly, but if the carrier has given him the power it ought to be responsible for the results. Nevertheless, in a majority of the States of this country, and in the Supreme Court of the United States, the English case has been followed; and the carrier would be liable neither on an accommodation bill nor a fictitious bill where no goods were shipped. There have been some attempts to change this rule by statutes, and in about ten States there is a statute, the Uniform Bill of Lading Act, so called, which provides among other things that the carrier shall be liable in the case supposed; but the trouble is bills of lading dealt with in one State will not generally originate in that State. If a fictitious bill was issued in Chicago, although the bill named as a consignee a person in Boston and was bought by a Boston bank, the liability of the carrier on that bill of lading would be determined by the law of Illinois. So unless you have a satisfactory law where the bill originates you will not be protected. Fortunately, the same statute has been passed in several States, and it is to be hoped that it will be in more. This, then, is the first risk, and the only way of obviating it is to have the law in a satisfactory shape, passing

a statute wherever it is necessary, so as to make the carrier liable for the wrongful act of its agent in issuing a bill of lading when no goods have been received.

279. GOODS BEHIND BILL OF LADING INFERIOR IN KIND OR QUALITY.—The second difficulty is somewhat analogous to the first. Suppose there are some goods behind the bill of lading but they are not of the quantity, quality or kind that the bill of lading specifies. This is a difficulty that cannot very well be wholly obviated. We may suppose that the goods originally were of defective quality and kind, or that they became so. Suppose, first, that a number of barrels of sand are delivered to a railroad and they are marked barrels of sugar, and the carrier issues a bill of lading for so many barrels of sugar. Now, the purchaser of the bill of lading finds, when he comes to realize on his security, that he has got barrels of sand with a freight bill against them for more than they are worth. What can he do? Of course, he has a right of action against the fraudulent shipper, but perhaps the shipper has run away or is irresponsible. Is the carrier liable here? The answer to this is, no. In the first place, the bill of lading says, "Contents and condition of contents unknown," so that the carrier has expressly guarded against promising that the barrels really contained sugar. And even aside from this clause it has been held that the carrier is not liable for such a concealed defect. If, however,

it was apparent when the carrier received the goods that they were not of the kind or quality named, then the carrier would be liable if it issued a bill of lading without specifying the difficulty. Thus, if the bill of lading called for 100 barrels of sugar and there were 95, the carrier would be liable for the missing five. It has admitted it received 100, and has promised to deliver 100; it must do so or be liable.

280. SHIPPER'S LOAD AND COUNT.—There is an exception to this last statement, however, in regard to one class of bills which are very common in some lines of trade; these are "shipper's load and count" bills. In many cases railroads build spur tracks to factories and run empty cars up to the factories, where the shipper loads the cars and himself writes out the bill of lading. An enormous fraction of the business of the country, consisting of the large shipments from factories, at any rate, is done in this way. The railroad agent simply signs a bill of lading as it is presented to him by the shipper who has made out the whole bill except the signature, and has loaded the car, the railroad agent seeing nothing of it. The railroad agent stamps across such a bill of lading, "Shipper's load and count." That means, "The shipper loaded this car and counted the contents. We are not responsible, therefore, for the loading or the counting." The second great principle in regard to lending money on bills of lading is never to touch a shipper's load and count bill which obviously has not the respon-

sibility of the carrier. You would have to rely wholly on the honesty of the shipper. The railroads, seeing that they are freed from liability on this form of bill, have sometimes, in some parts of the country, thought it would be a good thing to stamp every bill, "Shipper's load and count." That is an injury to the shipper, because the banks do not like to take such bills of lading, and yet not infrequently he cannot do much about it. In fruit shipments from California that sort of thing has been very common.

281. DESTRUCTION OF GOODS IN TRANSIT.—So much for defects arising at the time of shipment, but one may also have difficulties which arise after the shipment. Suppose the goods are absolutely destroyed in transit by any of a variety of causes. The owner of the bill of lading necessarily loses his security, unless under the bill the carrier is responsible for that particular kind of loss. But it may happen that the carrier is not responsible for that particular kind of loss. One may protect himself here, perhaps, by insurance of some kind. That would be the way to obviate this sort of risk, but if complete protection against this kind of risk is desired, the insurance ought to be not only against fire but against destruction, or really against deterioration in any form. Of course, goods which are likely to depreciate in transit are not as good security as goods which are more durable. A cargo of bananas is not as good security as a cargo of grain.

282. LACK OF TITLE IN SHIPPER.—A third risk which any one who takes a bill of lading runs is lack of title to the goods in the shipper. Suppose the shipper stole the goods and brought them to the carrier and demanded and received an order bill of lading. That looks like as good a bill of lading as any, and the goods may be all right, but the holder of the bill of lading cannot keep the goods. They still belong to the original owner from whom the shipper stole them. That kind of loss in actual practice does not occur very often, perhaps not oftener than when one is dealing in goods themselves. Of course, in the case of goods themselves, it is also true that if the seller does not own the goods the buyer cannot get title to them.

283. SPENT BILLS.—A fourth risk is that the bill of lading may be a "spent bill," as it is called. A spent bill is one where the goods have been delivered by the carrier at destination, but the bill of lading has not been taken up. A bill of lading is unlike a note in this respect—it has no date of maturity. When you buy a promissory note you can guess whether it has been dishonored or not, by whether the time for performance has come or not; but if a bill of lading for a cargo of goods is offered to you, you have no means of telling whether the cargo has arrived the day before and the goods been all removed. Of course, the carrier ought to take up an order bill of lading when the goods are delivered, and in the Uniform Bill of Lading Act that require-

ment is made, and the carrier is made liable on the bill if it is left outstanding and is purchased by a bona fide purchaser for value, who supposes that the goods are still in transit. This trouble with spent bills is not so likely to arise as a corresponding difficulty with what may be called "partially spent bills." It is not uncommon for partial delivery to be made and the bill of lading still left in the hands of the holder. Commonly, when all the goods are delivered, the bill of lading is taken up, but when part is delivered the carrier does not feel justified, and indeed is not justified in demanding the surrender of the bill when only part of the goods has been delivered. What ought to be done, of course, is to indorse on the bill of lading that part of the goods has been delivered, with a specification of the part. This also is required by the bill of lading statute, and a carrier is made liable for failure to indorse on a bill of lading goods which have been delivered.

CHAPTER XIV

Bills of Lading, Continued; Warehouse Receipts; Safe Deposit Companies

284. LACK OF TITLE TO BILLS OF LADING.—A fifth risk which one who buys or lends money on bills of lading runs is the chance that the person from whom he takes a bill of lading may not have title to it. This risk is the same that one runs in regard to negotiable paper. If an indorsement is forged, or if for any reason the holder of a bill of lading—or for that matter of a bill of exchange—cannot give a good title to it, one who purchases from him will not get a good title.

285. MEANING OF NEGOTIABILITY.—The extent of this risk depends somewhat on the degree of negotiability which is given to bills of lading, and requires an understanding of what negotiability means. Ordinarily, one who buys a contract right gets no better right than the person from whom he buys it. On the other hand, though one who buys chattel property capable of delivery, like a horse or a book, does not get title if the person who sold it to him had no legal title, yet a purchaser does get a good title to such property if he buys in good faith and for value from a person who has legal title though not an equitable title. You will see this best by an illustration. If a fraudulent person gets a contract right assigned to him by

fraud, and then sells the contract right to a bona fide purchaser, the bona fide purchaser gets no greater right than the fraudulent person has; in other words, he cannot collect on the claim which he has obtained. On the other hand, if a fraudulent person gets assigned to him by fraud a horse or a book, he has acquired the legal title, and though he is subject to an equity, as the phrase is, and the horse or the book could be taken away from him by the defrauded person if he could act quickly enough, yet a purchaser for value, without notice of fraud, will get an indefeasible legal and equitable title to the horse or the book.

Now, negotiable paper—like bills of exchange and promissory notes—is subject to the same rule as the horse or book, and is not subject to the same rule as ordinary contract rights; that is, a purchaser in good faith of an order bill of lading will get title to it and to the goods behind it, in spite of the fact that the person from whom the bill of lading was bought was fraudulent and could have had the bill of lading or the goods behind it taken away from him by the person defrauded.

Another feature of negotiability is that the terms of the instrument on the face and back are regarded as definitely showing the title. If the instrument is made to A's order, A has power by indorsement to give a good title, whatever may have been the reason the instrument was made payable to A, and even though it was agreed by the original parties

that A should be merely an agent and have no title or right to transfer. If the instrument is made out on its face to bearer, or is indorsed in blank by the person to whom it is made out on the face, any one acting in good faith may treat the holder as the owner and acquire a good title from him, though in fact the holder may not have had a good title. Under the Uniform Bills of Lading Act and under some other local statutes bills of lading running to order are given full negotiability, but in many States they are only partially negotiable.

286. INDORSEMENT OF BILLS OF LADING.—Order bills of lading need, for their negotiation, indorsement by the consignee, just as a promissory note needs indorsement by the payee. But there is one difference between the indorsement of a bill of lading, it may be said in passing, and the indorsement of a promissory note. The indorser of a bill of lading incurs no liability by his indorsement. His indorsement is simply a transfer. If it turns out that the bill of lading is not honored by the carrier, the holder of an indorsed bill of lading cannot come back on the indorser in the way that the holder of a promissory note can come back on the indorser if the maker fails to pay.

287. FORGED BILLS OF LADING.—One final risk in regard to bills of lading is that the bill of lading may be forged or altered, and this has in practice proved the most serious risk of all. There have been in recent times several sets of frauds cre-

ated by forged bills of lading. The most recent and one of the largest are known as the Knight-Yancey frauds which originated in Alabama. A cotton firm named Knight, Yancey & Co. forged a quantity of bills of lading and obtained a very large amount of money from banks. A circumstance that renders forgery easier in the case of bills of lading than in the case of any other valuable document, such as a check or a stock certificate, is the carelessness with which bills of lading have been made out. It is really incredible, the carelessness with which this has been done. Documents which represent a value of many thousands of dollars are scribbled hastily, in pencil sometimes, on forms that are accessible to anybody. The forgeries that have taken place have called attention to this evil, and at the present time there is more care exercised in making out order bills than was the case a few years ago, but even today an order bill of lading is made out with no special precautions against forgery. The forms can be obtained at any railroad station, and it is simply a question of copying writing, no devices of perforating or serial numbers or things of that sort being ordinarily used.

288. DEVICES TO PREVENT FORGERY.—In order to meet this risk several devices have been suggested. One which has been urged upon Congress is to pay the railroads a special small fee for issuing order bills with the precautions that a stock certificate is issued. The railroad would take the

blank from a numbered book and would punch and stamp it in such ways and with such countersigning that it would be very difficult to forge. That method has not found much favor with shippers because they dislike the extra expense. They get their order bills of lading for nothing now, and they want to continue to do so. Another project is to make some sort of central clearing house to which shall be reported all order bills of lading as they are issued, so that it will be known whether there is outstanding a document corresponding to one that is offered to a bank for security. This method is to some extent in use.

289. ALTERATION OF BILLS OF LADING. —Alteration of a genuine bill may be as damaging as out and out forgery of a new one. This case occurred in Maryland a few years ago: a man who had always been in good repute had a line of credit at the bank, where he kept, as security, bills of lading. He was allowed to change these as he wanted to, putting in sufficient collateral always to cover what he took out. The railroad and steamboat lines with which he did business neglected in some instances to take up the bills of lading which he presented for shipments. They habitually did not take up the straight bills, and that is not required by law, and sometimes they did not take up the order bills. When this man got hard pressed he took some old order bills which he still had in his possession and changed the dates; then he took some straight bills

which he had in his possession and changed the dates of those, and also added the words "or order" to the name of himself as consignee. Then, after indorsing those they looked good. He took those altered bills to his bank and substituted them for genuine bills, and when the fraud was found out the bank found itself with about $100,000 of altered bills of lading. The carrier was held liable on the order bills even though they had been altered, because it should have taken them up, but on the straight bills, which were a great part of the whole, the bank lost. Of course, they were still legally straight bills, although the holder had written "or order" on them. That fraud led to one protection being made in the uniform bill of lading recommended by the Interstate Commerce Commission. The uniform form of order bill has the words "order of" printed before the blank for the consignee's name, so that a straight bill cannot be made into an order bill by adding "or order." Moreover, the difference in color between order and straight bills now gives a protection as to domestic bills; not as to foreign bills, however. If a bill is altered fraudulently the bill is worth just as much and just as little as it would have been worth if no alteration had been made; that is, the alteration, not the bill itself, is void.

290. ATTACHMENT OF GOODS IN TRANSIT.—There is one other risk in regard to bills of lading which no longer exists where the Uniform

Bill of Lading Act is in force, and that is seizure by attachment for the benefit of some creditor. The bills of lading act provides that when there is an order bill outstanding against goods shipped by a carrier there can be neither attachment by a creditor nor stoppage in transit by the seller if unpaid. Where the uniform statute has not been passed, the matter is not so clear. Undoubtedly one who purchased for value or lent money on an order bill would be protected against later attachments by creditors of the former owner of the bill; but if creditors of the former owner had attached the goods prior to the transfer of the bill, the attachment would generally be held good though the man purchasing or lending money on the bill knew nothing of the attachment.

291. WAREHOUSE RECEIPTS ARE SIMILAR TO BILLS OF LADING.—To what has been said in regard to bills of lading a few words in regard to warehouse receipts may be added. Warehouse receipts are entirely similar in character to bills of lading, and what has been said in regard to them is, in general, applicable to warehouse receipts. There is a Uniform Warehouse Receipts Act which is similar in its provisions to the Uniform Bills of Lading Act, and the Warehouse Receipts Act has been enacted in a majority of the States. Warehouse receipts may be in form order or straight. They are simpler in form, ordinarily, than bills of lading, because they do not have so many

special stipulations and conditions, but in other respects they are practically identical. The risks that one who deals in them runs are the same in their nature as in the case of bills of lading. There is one circumstance, however, in regard to warehouse receipts that gives one a better chance to protect himself that in the case of bills of lading. Warehouse receipts are generally used as collateral and for purchase and sale in the city where the goods are stored. It is therefore possible to telephone to the warehouseman or otherwise to assure one's self of the existence of the goods in a way that is not possible under the bill of lading, where the goods are in transit. The warehouse receipt, even less than a bill of lading, has a day of maturity. A bill of lading, as we have seen, has no particular day on which it is evident to a purchaser that it has finished its work, and that is even more true in a warehouse receipt. The fact that a warehouse receipt is pretty old does not necessarily show that the document is not a perfectly good document and that the goods are not there.

292. OPEN RECEIPTS.—There is one way of doing business with warehouse receipts which is different from anything that takes place with bills of lading and which has been a subject of criticism, and deserves criticism; this is the practice of issuing what are called open receipts. In an open receipt the warehouseman acknowledges he has received a certain quantity of things of a certain sort, and will

redeliver that quantity of things of that sort; but not necessarily the identical things that were deposited. It is contemplated that the depositor shall have the right to substitute from time to time for the goods originally deposited other goods of like kind and quantity; that is, a receipt may be issued for 100 bales of burlap. The depositor who deals in burlap wants to use some of the bales that are in storage. He has pledged his warehouse receipt which he originally received for the 100 bales of burlap and he cannot surrender that, but he wants the warehouseman to let him take out 25 bales of the old burlap and put in 25 bales of new, and that is sometimes allowed. It seems a very unsafe practice. It is unsafe for one who lends on warehouse receipts to allow the depositor and the warehouseman to agree between themselves as to what shall be a sufficient substitution of goods which are the bank's collateral. Moreover, it is unsafe for the warehouseman, because if the holder of the warehouse receipt has not really consented to the substitution, or unless the form of warehouse receipt clearly shows that substitution is contemplated, the warehouseman would be liable to the holder of the receipt if the substituted goods turn out to be inferior to those which were originally deposited.

293. WAREHOUSEMAN IS A BAILEE FOR HIRE.—A warehouseman is a bailee for hire, and a bailee for hire is liable for neglect if the goods are destroyed or injured by its negligence. The ordi-

nary bailee for hire is not subject to the extraordinary liability to which a carrier is subjected while the goods are in transit.

294. SAFE DEPOSIT COMPANIES ARE BAILEES FOR HIRE—There is one special kind of bailee in regard to whom it may be worth while to say a few words particularly, and that is a safe deposit company. It has been questioned whether a safe deposit company is properly a bailee of the goods in the boxes to which the safe deposit company does not have access. It is simply in control of the general premises, and, furthermore, the holder of the boxes cannot get at what is inside without the assistance of the safe deposit company. There is, therefore, a sort of joint possession. The safe deposit company and the depositor who hired the box have together the full control of the goods, but neither one of them alone has it. It has been suggested that the safe deposit company is merely a sort of watchman; that it is guarding property of which it is not in possession. But it is doing a little more than guarding, and it is generally held to be a bailee for hire; that means it must take reasonable care of the goods in its possession.

295. LIABILITY OF SAFE DEPOSIT COMPANIES FOR LOSS OF GOODS.—There are a number of cases, not a great many, but still some, where safe deposit companies have been sued for goods which were missing, or which the depositor swore were missing, from his box. If the court or

jury is convinced that the goods have been lost from the box, the burden of explanation as to how it happened would be upon the safe deposit company. The safe deposit company is liable for the acts of its servants and agents. Of course, then, carelessness in regard to duplicate keys of any of the boxes might render a safe deposit company subject to suit if loss occurs thereby.

296. LIABILITY OF DEPOSITED GOODS TO GARNISHMENT.—One of the most important questions in regard to safe deposit companies is this: are the goods in the safes subject to legal process? Suppose a safe deposit company is garnished (that is served with a trustee writ) in a suit against some one who has a box; can the company answer that it has no funds or goods of the defendant in its possession? Yes, it may; it cannot control the goods and it may answer no funds. One case, however, must be distinguished, and that is where a bank or a safe deposit company has a separate trunk or box of a depositor in its possession. If it has that separate box, even though it is locked and the bank has not the key, the bank cannot answer no funds; it must answer that it has a box the contents of which are unknown to it. A box, however, shut up in a safe deposit vault, that is, one of the regular tin safes, cannot be reached by the safe deposit company in the normal course of affairs unless the depositor unlocks his lock. That is the reason for distinguishing between such a box and an ordinary

box or trunk which is not itself enclosed in something, to which the bank or safe deposit company does not have access.

297. LIABILITY OF DEPOSITED GOODS TO ATTACHMENT.—Whether property in a safe deposit company is liable on a writ of attachment in a suit against the owner, is not so clear. It has been held in one case that it is so liable, and that the officer has a right to go in and seize the goods. This will not often be attempted, however, because the officer will not know in what box the debtor might have goods, and the safe deposit company will not tell him. The company is certainly under no obligation to help the officer. The regular way for a creditor to get at the goods of his debtor concealed in the safe deposit box is by first making the debtor disclose on examination in court what property he has, and then getting an order from the court that the debtor shall turn over what he has disclosed. This he must do or be imprisoned until he does. There is only one difficulty with this remedy, and that is the debtor may commit perjury; he may have something in the box and not disclose the fact.

298. SEARCH FOR STOLEN PROPERTY.—If stolen property were sought, a search warrant describing the property might be presented to the safe deposit company, and it would have to permit the officer of the law to make the search for the goods described, but only for goods described in the

search warrant. There is a case in New York where, on a search warrant for certain articles, the officer of a safe deposit company allowed the officer of the law to make a general examination of goods in its possession and to remove some bonds which were not specified in the search warrant. The safe deposit company was held liable.

299. DEATH OF DEPOSITOR.—The question often arises, What is the situation on the death of the owner or renter of a safe? It is the same as in the case of the death of any bailor or depositor. The bailee must recognize the title only of the person who is appointed by law as the successor in interest to the deceased person. The safe deposit company has the right, and should exercise it, to demand proofs and identifications of persons who claim rights as representing deceased persons. Sometimes a dispute arises between joint owners of a box. In that case the only safe course for a safe deposit company would be to recognize the right of none until it had been passed on by the court. What is called a bill of interpleader, to determine which one has the right, should be filed in court, unless the conflicting interests can agree or one of them gives a bond to the company to insure its freedom from liability if it delivers the goods to him.

300. SAFE DEPOSIT COMPANY HAS NO LIEN.—A safe deposit company has no lien on the contents of a box for anything due to it. In that

respect it is different from an ordinary warehouseman and a carrier, who have a lien on the goods in their possession for their charges. The reason is that a safe deposit company is not in such possession of the contents of a box as to give it a lien. If the renter of the box does not pay his bills, however, the company has the right to open the box and remove its contents, keeping them safe for the owner.

301. GIFT OF GOODS IN A SAFE DEPOSIT BOX.—It was held in a recent Illinois case that the gift of the keys of a safe deposit box amounted to a valid gift of property in the box when made with that intention. In order to make a good gift there must be a valid delivery, and it was held that the delivery of the keys amounted to a symbolic delivery of the contents of the box.

302. RIGHT OF SAFE DEPOSIT COMPANY TO SUE FOR GOODS WRONGFULLY TAKEN.—If goods are wrongfully removed from the box of a depositor, the safe deposit company has a right to reclaim them like any bailee, for it is the law that if goods are taken out of the hands of a carrier, warehouseman or other bailee wrongfully, the bailee may reclaim the goods from the wrongdoer, and bring an action at law for them not as owner but because the bailee has the right of possession to them while in his custody, and he may be liable if he lets them get into the hands of any one other than the true owner.

303. LIABILITY OF SAFE DEPOSIT COMPANIES UNDER INHERITANCE TAX LAWS.—One recent case in regard to the Illinois inheritance tax law indicates an imposition of some burden on the safe deposit company. The company is required to notify the Attorney-General ten days before it allows access by the representative of a deceased person to his box, and under certain circumstances the safe deposit company is required to retain from the contents of the box a sufficient amount to pay the tax, and is made liable if it fails to do so. This provision was held constitutional by the Supreme Court of Illinois.

CHAPTER XV

Insolvency and Bankruptcy

304. INSOLVENT DEBTORS — "GRAB LAW."—When a debtor is insolvent there are several things that he may do. In the first place he may do nothing. He may let his creditors try to get any money out of him if they can, and in general let the creditors take the laboring oar. Where there is no bankruptcy law prevailing, either State or federal—and that was the situation in many of the States of the Union prior to the passage of the present national bankruptcy law—a debtor might get along that way for a long time. That is one thing he might do.

305. COMPOSITION WITH CREDITORS.—The second thing the debtor may conceivably do is to try to make a composition with his creditors. Though it is the law that receiving a smaller sum will not discharge a liquidated and undisputed debt for a larger amount, even if it is so agreed, an exception is made in the case of a composition where a number of creditors agree that each of them will take a smaller sum for his claim. The debtor may try to get his creditors to do that, and occasionally he succeeds.

306. GENERAL ASSIGNMENTS.—A third thing which he may do is to make a general assignment of all his property to trustees in trust to pay

his creditors ratably. Such an assignment is not valid in Massachusetts when made though in most States it would be, if free from fraudulent incidents. In Massachusetts it would not prevent his creditors, or any one of them, from attaching his property just as if it had not been assigned, but if creditors assent to the assignment then, to the extent of their claims, the assignment becomes valid. In other States the assent of creditors is presumed if the assignment is not fraudulent, and therefore without any actual assent the situation is the same as in Massachusetts after assent of all the creditors.

307. FRAUDULENT INCIDENTS IN GENERAL ASSIGNMENTS.—In every State a general assignment under certain circumstances will be regarded as fraudulent against creditors. Such a conveyance may be treated as void by the creditors, and the property conveyed seized by them as if the debtor had made no conveyance. Some of these incidents which may make a general assignment fraudulent may be noted. If the assignor was solvent when the conveyance was made, the transaction is fraudulent, for if he has sufficient assets to pay his debts, the only object of the assignment can be to prevent them from being paid at once, and compelling the creditors to wait until the assignees under the deed realize upon the property that the debtor holds, at better advantage than if a forced sale were made at once. If the assignees are given unlimited power to continue business it is also fraudulent,

since the business would in effect be carried on at the risk of the debtor. The debtor being insolvent will lose nothing if the business proves unprofitable whereas if profitable there may be a surplus after the payment of the debts. A provision authorizing continuance of business so far as is necessary to dispose of property on hand, or to work up raw material on hand, is generally upheld. A provision authorizing sales upon credit is often, though not uniformly, held fraudulent, since it permits the assignees to defer the settlement of the estate. The most important provisions likely to be attacked as fraudulent, however, are provisions in regard to preferences. Aside from bankruptcy statutes it is lawful for a debtor who has insufficient means to pay all of his creditors, to pay some in full, though this results in the total exclusion of others. Accordingly a general assignment of a debtor's property on a trust that the assignees shall pay in full certain named creditors and pay the remaining creditors ratably out of the residue has generally been upheld though statutes in some States have altered the law in this respect. A kind of preference which is generally deemed fraudulent, however, is one which is made conditional on the creditors giving the debtor a discharge. A general assignment, unlike a bankruptcy law, or a composition, does not free the debtor from liability for so much of his debt as remains unpaid. Debtors have sometimes sought to avoid this result by making a general as-

signment of their property in trust for ratable distribution among such creditors as should give the debtor a full release and discharge of all claims. Such a provision, attempting, as it does, to impose as a condition of a creditor's sharing, that he should take his share in full satisfaction of his claim, is almost universally held to make a general assignment fraudulent. Since the bankruptcy law a general assignment may within four months be set aside by bankruptcy proceedings; but a creditor who has once assented to a general assignment cannot thereafter join in a bankruptcy petition against that debtor.

308. BANKRUPTCY.—The fourth and most important way, however, now of settling the estates of insolvent persons is provided by statute. The federal Constitution gives Congress power to pass uniform laws on the subject of bankruptcy throughout the United States, and the Supreme Court has held that when the federal government has not taken advantage of this privilege given by the Constitution, States have power themselves to enact bankruptcy laws. In some States there were such laws, but in many there were not. The federal law now supersedes all State laws on the subject. It was passed in 1898, and under that law the debtor may either become a bankrupt by his own voluntary petition, or his creditors may petition him into bankruptcy if he commits what is called an "act of bankruptcy." This is true, at least, if the debtor is

an individual, or is a moneyed business or commercial corporation (except railroads, insurance companies and banking corporations). When corporation of the excepted class become insolvent their affairs are settled by still a fifth method—receivership. A special privilege, also, is given to wage earners and farmers. They may if they choose become voluntary bankrupts, but are not liable to involuntary proceedings.

309. PETITIONS IN BANKRUPTCY.—Suppose a debtor wishes to become bankrupt himself. He files a petition in the United States District Court, which is the court of bankruptcy jurisdiction, and is immediately adjudicated a bankrupt. If his creditors want to make him a bankrupt it is necessary that three of them having claims amounting to not less than $500 in the aggregate should join, unless there are less than twelve creditors in all. In that event one creditor only may petition. This petition of the creditors must set forth (1) the creditors' claims, (2) that the debtor has committed an act of bankruptcy, and (3) that he owes debts aggregating $1,000 or more. However slight his indebtedness, if he cannot pay it a man may be a voluntary bankrupt, but he must owe at least $1,000 to be liable to involuntary proceedings.

310. ACTS OF BANKRUPTCY—FRAUDULENT CONVEYANCES.—Now what are the acts of bankruptcy which render a debtor liable to a petition by his creditors? In the first place a fraudulent

conveyance is an act of bankruptcy. Reference to a fraudulent conveyance by general assignment has been made; but there are many kinds of fraudulent conveyances. If a debtor who is insolvent, or who is made insolvent though a gift made by himself, should give away a portion of his property, that would be a fraudulent conveyance irrespective of the debtor's intent, because the necessary effect of the gift would be to hinder, delay and defraud his creditors. It would be a fraudulent conveyance for a debtor to seek to conceal his property from his creditors by putting it in the hands of some kind friend to hold for him until his creditors should cease to be so troublesome as at the present time. It would be a fraudulent conveyance for a man who is pressed by creditors to turn himself into a corporation for business purposes and assign all his property to that corporation. This transfer of his property to a corporation, even though it was done openly, would necessarily hinder and delay his creditors.

311. PREFERENCES.—As has already been said, paying one creditor to the exclusion of others is not a fraudulent conveyance, but it is a preference, and a preference is a second act of bankruptcy. Either for the debtor to give a preference himself or to allow a creditor to get a preference by legal proceedings is an act of bankruptcy. Any transfer made by an insolvent debtor to pay or to secure in whole or in part a previously existing debt is a preference.

312. GENERAL ASSIGNMENTS.—A general assignment, whether fraudulent or not, is an act of bankruptcy. The consequence is, therefore, that if a debtor makes a general assignment his creditors have the choice of letting it stand and having the estate settled under the general assignment, or of setting it aside and having bankruptcy proceedings.

313. RECEIVERSHIPS.—Still another act of bankruptcy is the appointment of a receiver on account of insolvency. There also the creditors virtually have an option of letting the receivership stand and having the receiver take charge of the distribution of the assets, or of petitioning the debtor into bankruptcy and having the bankruptcy court take charge.

314. ADMISSION OF INABILITY TO PAY DEBTS.—One further act of bankruptcy is an admission by the debtor of his inability to pay his debts and his willingness to be adjudicated a bankrupt. An act of bankruptcy can form the basis of a petition only within four months after its commission.

315. INSOLVENT DEBTORS USUALLY COMMIT ACTS OF BANKRUPTCY.—Now an insolvent debtor cannot very well avoid committing one of these acts of bankruptcy. He can avoid making a fraudulent conveyance, but he will find it pretty hard to avoid making a preference. He need not, it is true, pay any of his debts, and it is not a preference to pay money out for present considera-

tion or to transfer property for present consideration, as to make a mortgage for a new loan, but it will be hard for him to prevent creditors from getting a preference by legal proceedings, at least if the debtor has any assets at all; for if the debtor does not pay any of his creditors, some of his creditors will sue him, get execution and endeavor to levy it on the debtor's property.

316. PROCEDURE AFTER ADJUDICATION.—If a debtor has once been adjudicated a bankrupt it makes no difference whether it was on a voluntary petition or an involuntary petition, the matter goes on in both cases the same way. The first thing after the adjudication is that the referee, a sort of subordinate judge, requires the bankrupt to give in schedules of his assets and of his creditors. The debtor is induced to make these schedules as complete as possible for the following reasons: if the schedule of assets is knowingly incomplete the debtor is committing a crime and is likely to be shut up in jail. If the schedule of his creditors is incomplete, any creditor who is left out or whose address is so incorrectly given that the creditor does not get notice of the proceedings in time to prove his claim, is not affected by the discharge; and as the debtor wants a discharge from as many debts as possible, he, of course, will make his schedule of creditors as complete as possible. From this schedule of creditors the referee sends notices out to all the creditors to meet and choose the trustee. They do meet and

choose a trustee, who then endeavors to collect the assets of the estate, and under the direction of the court pays dividends from the assets to the creditors.

317. PROPERTY WHICH THE TRUSTEE GETS.—It may be asked what property the trustee gets. He gets all tangible property that the debtor could transfer at the moment of his bankruptcy. He gets intangible property, patents, trade-marks, copyrights, even liquor licenses, seats on the stock exchange and good-will of a business, with the exception that the debtor still retains the right to carry on his old business himself in the future in his own name. The trustee gets rights of action of the bankrupt, except personal rights of action, as they are called. These consist of rights of action for personal injuries, as for assault, or for personal injury by negligence. A right of action for breach of promise of marriage also would not pass to the trustee in bankruptcy. Not only does a trustee get this tangible and intangible property but he gets also a right to recover any property fraudulently conveyed by the bankrupt which is not in the hands of a bona fide purchaser, even if the fraudulent conveyance was made years before, provided the statute of limitations has not run. Any preference also made within four months before the filing of the petition in bankruptcy may be recovered from the preferred creditor if he had reasonable cause to believe when he received it that he was getting a preference, but

not otherwise. The trustee in bankruptcy gets the debtor's life insurance policies, except in so far as they are made exempt by statute. Life-insurance policies in favor of a beneficiary, other than the insured himself, are exempt, though if the premiums were paid when the debtor was insolvent, the premiums so paid within the past six years may be recovered, and the beneficiary would in effect have to pay those premiums back in order to hold the policy. Even if the policy run to the insured himself in his own name, he has the privilege, under the bankruptcy act, to redeem it from the trustee in bankruptcy by paying its cash surrender value. Property acquired by the bankrupt after the beginning of bankruptcy proceedings does not pass to the trustee. The bankrupt's property passes free of attachment or judgment liens, secured by creditors within four months prior to the beginning of bankruptcy proceedings. This has no bearing on a case where prior to bankruptcy money has been actually collected by legal proceedings, but only to cases of seizure under legal proceedings still pending at the time the petition is filed. And though if a debtor becomes bankrupt within four months after his property is attached the attachment is dissolved. If the debtor does not become bankrupt until after four months the attachment is a valid lien on the property attached, and so far as the property is sufficient to pay the creditor he can collect his claim from it, even though the debtor be-

comes bankrupt before the creditor finally gets judgment and collects his claim.

318. PROOF OF CLAIMS.—The trustee collects all this property and tries to reduce it to cash as fast as he can, and while this is going on creditors will also be proving their claims. It is only claims which exist at the time of filing the petition which are provable, but the debts need not be due at the time of the bankruptcy; it is only essential that they shall be in existence. Interest is added or rebated, at the case may be, to the date of filing the petition. That is, if you have a non-interest-bearing note falling due July 1, and the debtor becomes bankrupt May 1, the face of the note will be proved less a rebate of two months' interest to May 1, because the present value of the note on May 1 is what is provable. On the other hand, if the note had been due on April 1, interest would be added up to the date of filing the petition, and if the note was an interest-bearing note, of course the interest would be provable up to May 1, even if the note did not fall due until July 1 or later. Debts arising subsequently to the date of filing the petition must be enforced against the bankrupt's assets acquired after his bankruptcy. Claims for tort are not provable, that is, claims for injuries to person or property not arising out of contact. But a judgment for tort obtained before the filing of the petition is provable. There has been a good deal of trouble in regard to what are called contingent claims. The commonest

instance is the indorser's liability on a note which is not yet due when the indorser becomes bankrupt. At the time of filing the petition the indorser's liability is contigent on the possibility that the maker may not pay the note at maturity and that notice of dishonor be given to the indorser. Creditors who have received a preference cannot prove claims unless they have surrendered such preferences as they received within four months of the bankruptcy, with reasonable cause to believe that it was a preference. Secured creditors can realize on their security and then prove for the balance of their claims. A few claims are given priority over others and paid in full before any dividend to other creditors. The most important claims of this sort are the wages of workmen, clerks or servants earned within three months of the bankruptcy and not exceeding $300 in amount.

319. LEASES.—Leases belonging to the bankrupt pass to the trustee in bankruptcy if he wants them, but the trustee in bankruptcy need not take any kind of property which seems more burdensome than beneficial to him, and as a trustee would have to pay in full the rent under a lease if he took it, he frequently will prefer to abandon it. The landlord can prove for rent which is already accrued, but he cannot prove for rent which has not already accrued, even though part of the period for which the rent is claimed has elapsed, unless there is in the lease a special covenant. If the trustee in

bankruptcy assumed the lease, then, of course, the landlord would look to the trustee for the rest of the term. If the trustee did not assume the lease, the landlord would have his option of doing either of two things: he could leave the bankrupt in the premises and have a right of action against him for the rent from time to time as it accrued, or he could eject the tenant; but if he ejected the tenant he could not hold him for rent. Generally he would eject a bankrupt tenant rather than let him stay.

320. SET-OFF.—Set-off may be made by a debtor of the estate who also has a claim against the estate. He does not have to prove his claim, taking a dividend on it and then paying in full the debt which he owes to the estate. He may set one off against the other, but he is not allowed to acquire claims for the purpose of set-off within four months prior to bankruptcy. Otherwise one owing money to an insolvent debtor could buy up at a discount claims against him, equal in amount to the purchaser's indebtedness to the bankrupt.

321. EXAMINATION AND DISCHARGE OF BANKRUPT.—The bankrupt may be examined by any creditor with a view to the disclosure of his assets. This is a most important right. Finally, if, in every respect, he obeys the bankruptcy law, the debtor gets a discharge. Grounds for refusing him a discharge are that he has made a fraudulent conveyance; that he has obtained credit by false representation; that he has failed to keep books of

account for the purpose of concealing his financial condition; that he has committed any offence punishable by the bankruptcy law, as making a false oath or refusal to disclose his property or to submit to examination; and finally a debtor who has already been discharged in bankruptcy within the previous six years cannot, as a voluntary bankrupt, again obtain a discharge. These are reasons for refusing a discharge altogether, but even though a discharge is granted, certain liabilities are not discharged. Claims for obtaining property by false pretences or for false representations are not discharged. Claims for defalcation or embezzlement as a public officer or as a fiduciary and claims for wilful and malicious injury to the property of another are not discharged. Nor are taxes or claims for alimony or for the support of a wife or dependent children.

322. COMPOSITION IN BANKRUPTCY.—At common law it was necessary to have the consent of all a debtor's creditors in order to make the composition operative as against all of them. In bankruptcy there is a special provision for composition, and with the approval of the court a composition may be declared binding not only as against those who have assented to it, but as against all creditors having provable claims, if a majority in number and amount of the creditors taking part in the bankruptcy proceedings assent to the discharge.

BOOK II

NEGOTIABLE INSTRUMENTS

CHAPTER I

Introduction to Negotiable Instruments

THE LAW OF NEGOTIABLE INSTRUMENTS has been codified in most States by a statute known as the Negotiable Instruments Law. Prior to the enactment of this statute, and still in the few jurisdictions of the United States where the Negotiable Instruments Law has not been passed, the law governing bills, notes and checks, is based on the Common Law; that is, on a series of rules gradually built up during the past centuries in England and the United States from the decisions of courts on various questions as they arose from time to time. Even in jurisdictions where the Negotiable Instruments Law has been enacted the common law is still important in determining controversies on negotiable instruments. It is important in the first place as aiding the interpretation of the language of the Negotiable Instruments Law. Unless that language clearly requires a different construction, courts presume that the statute restates the rule of the common law which existed prior to the enactment of the statute. In the second

place, the common law is still important because cases not infrequently arise which are not clearly covered by the statute, and section 196 of the statute enacts that cases not provided for in the statute shall be governed by the unwritten law previously existing. That portion of the common law which relates to negotiable instruments and to certain other mercantile transactions is frequently called the "Law Merchant."

2. THE NEGOTIABLE INSTRUMENTS ACT.—The Negotiable Instruments Law is based upon an earlier English statute, called the "Bills of Exchange Act," which codified the law of England governing negotiable instruments, and was enacted in 1882. As the Common Law of England upon this subject was in the main like that of the United States, the English statute furnished great aid in codifying the American law. Most of the States of America have appointed commissioners to promote uniformity in the laws of the several States. These commissioners meet annually in conference and in 1895 undertook the draft of the American Negotiable Instruments Law. The following year the draft was discussed by the Conference and recommended for adoption by the several States. The law thus drafted has been adopted in most of the United States. The following list shows the States and territories in which the law has been adopted, with the date of enactment, and also the States and territories that have not yet adopted such law:

District of Columbia (1899)
Florida (1897)
Georgia (not enacted)
Hawaii (1907)
Idaho (1903)
Illinois (1907)
Indiana (1913)
Iowa (1902)
Kansas (1905)
Kentucky (1904)
Louisiana (1904)
Maine (1917)
Maryland (1898)
Massachusetts (1898)
Michigan (1905)
Minnesota (1913)
Mississippi (1916)
Missouri (1905)
Alabama (1907)
Alaska (1913)
Arizona (1901)
Arkansas (1913)
California (1917)
Colorado (1897)
Connecticut (1897)
Delaware (1911)
Montana (1903)
Nebraska (1905)
Nevada (1907)
New Hampshire (1909)
New Jersey (1902)
New Mexico (1907)
New York (1897)
North Carolina (1899)
North Dakota (1899)
Ohio (1902)
Oklahoma (1909)
Oregon (1899)
Pennsylvania (1901)
Porto Rico (not enacted)
Rhode Island (1898)
South Carolina (1914)
South Dakota (1913)
Tennessee (1899)
Texas (not enacted)
Utah (1899)
Vermont (1913)
Virginia (1898)
Washington (1899)
West Virginia (1907)
Wisconsin (1899)
Wyoming (1905)

3. AMENDMENTS AND VARIATIONS.—In a few States the Negotiable Instruments Law has been somewhat amended. All important amendments are indicated by notes following the several sections of the Act. Unfortunately in the statute as passed in the several States the section numbering adopted by the Commissioners of Uniform Laws has not always been followed. The references in this book are to the numbers adopted by these Commissioners. Most of the States which have adopted the Negotiable Instruments Law have incorporated the

Commissioners' numbering of the sections. As the Negotiable Instruments Law, even in the few passages where its terms are not wholly clear or satisfactory, is the ultimate authority on the subject, it is necessary to be familiar with its language and arrangement. Each section of the Act should be read carefully and the comment and illustrations following the sections will make the meaning and application plainer. But before the Act is studied, a few fundamental principles in regard to negotiable instruments should be understood.

4. A NEGOTIABLE INSTRUMENT IS A CONTRACT OR A SET OF CONTRACTS.—A negotiable instrument is a contract or a collection of contracts. An unindorsed promissory note is a single contract—a contract of the maker with the payee. So an unaccepted and unindorsed check or bill of exchange is simply a contract of the drawer with the payee. When these instruments are endorsed, or when a bill of exchange is accepted, an additional contract is created. The study of the law governing negotiable instruments aims to acquire a knowledge of the terms and legal effect of the various obligations which may thus arise on negotiable paper.

5. THE CONTRACTS ON NEGOTIABLE INSTRUMENTS ARE FORMAL CONTRACTS. —To understand the law of negotiable instruments some elementary knowledge of the law of contracts is desirable. Contracts may be divided into simple

contracts and formal contracts. Simple contracts owe their validity to mutual assent of the parties, to the terms of a promise, or set of promises for which the promisee gives consideration. The typical formal contract of English and American law has been the contract under seal which was enforcible though no consideration was paid for it. For a detailed statement of what this implies, reference must be made to the volume dealing with business law generally. Formal contracts depend for their validity on the form in which they are made. The contracts on negotiable instruments partake of the nature of simple contracts in requiring consideration for their validity but they also partake of the nature of formal contracts. No instrument and no contract on an instrument which does not comply with certain rules as to form is negotiable. Moreover, the instrument itself is regarded as the obligation, not simply as evidence of it.

6. THE TERMS OF THE CONTRACTS ON NEGOTIABLE INSTRUMENTS ARE LARGELY IMPLIED.—In an ordinary written contract the parties write out fully the terms of their agreement, but where the customs of business lead men to enter constantly into contracts of the same sort, abbreviated statements of the terms of their contracts are likely to be employed. Thirty days, for instance, may be used in a contract for the sale of goods to mean that the price of goods sold is not due for thirty days, and a variety of illustrations

might easily be given of abbreviated mercantile memoranda in contracts. So in bills of exchange and promissory notes—the terms of the contract are not fully expressed. The contract between the maker and payee of a promissory note is indeed stated with some fullness, but the contract of a drawer of a bill of exchange or of a check is not stated. In form such a document is merely an order on another to pay a certain sum of money, but by mercantile custom it is also in legal effect an abbreviated promise that "If the drawee fails to pay on demand at maturity, and I am promptly notified of his failure, I will pay." The contract of an endorser is similarly to be understood from mercantile custom not because of express language used. It is possible to write on negotiable instruments contracts other than those made negotiable by custom of merchants. Thus a guaranty may be written on a bill or note, but its effect must be judged as a simple contract, as if it were on a separate paper.

7. WHAT IS MEANT BY NEGOTIABLE.—Contracts in our law may generally be assigned so that the assignee stands in the same position as the assignor. This is not true of all contracts, but it is the general rule. It would be true of any promise to pay money, even though it were not negotiable. What then is the importance of an instrument being negotiable? It is mainly this: that the negotiation of a negotiable instrument to a holder in due course does not merely give the holder the rights

of the original promisee, it gives him those rights free from any personal or equitable defence which might defeat them; or, as it is often briefly put, negotiation cuts off equities. This requires a brief definition of what is meant by an equity, an equitable defence, or a personal defence, for all these terms mean the same thing.

8. ABSOLUTE AND PERSONAL DEFENCES.—The law distinguishes between a situation where there is only apparently but not really a negotiable obligation, and a case where there is an actual negotiable obligation but for some reason in justice it should not be enforced. If the signature of a maker to a negotiable instrument is forged, though he has apparently entered into a negotiable obligation, in fact he has not. If, however, he has been induced by fraudulent misstatements to sign such an instrument, he has actually entered into a negotiable obligation, though it is unjust to enforce it in favor of the fraudulent payee. On the forged note nobody could recover against the apparent maker. On the fraudulent note the payee could not recover, but a holder in due course could. It may then be said that forgery is an absolute or real defence while such fraud as that given in the illustration is a personal or equitable defence, or, briefly, an equity. No equitable defence is available against a holder in due course. That is, one who has paid value for the instrument before maturity in good faith without notice of the defence.

This distinction between absolute or real defences on the one hand and personal defences or equities on the other hand, is fundamental in the law of negotiable instruments, and it is essential to remember which defences fall under these headings.

9. WHAT ARE REAL AND WHAT ARE PERSONAL DEFENCES.—The following defences to an obligation are absolute or real:

First—The lack of genuineness of the signature. This may be due to forgery or it may be due to lack of authority on the part of an agent who made the signature on behalf of another.

Second—Fraud of some kinds.

Third—Lack of title, as where a holder claims through a forged endorsement.

Fourth—Bankruptcy of the holder.

Fifth—Material alteration of the instrument.

Sixth—Legal incapacity as of a minor, an insane person, and in some jurisdictions—as to some matters—a married woman.

Seventh—Illegality of certain kinds.

Eighth—The legal discharge of the instrument or the obligation in question.

The following are personal defences, or equities only, and are not available against a holder in due course:

First—Illegality of certain kinds.

Second—Fraud generally.

Third—Duress.

Fourth—Lack of delivery of the instrument.

Fifth—Lack of consideration.

Sixth—Failure of consideration.

Seventh—Discharge of the instrument before maturity.

Eighth—A surety is discharged by certain dealings with his principal which are prejudicial to him.

Ninth—Set-off.

The meaning of these various defences will not be understood without the explanation of them hereafter given, but a list of them seems desirable in this place as a summary.

There may be a defence to one obligation on a negotiable instrument and no defence to another. Sometimes all the obligations on an instrument are subject to the same defence, as where the instrument is materially altered after all the signatures have been put upon it. Sometimes there may be a defence of one kind to one obligation on the instrument, and a defence of another kind to another obligation. The obligation of each person whose name appears on the instrument frequently must be considered separately.

10. WHAT A STUDY OF THE NEGOTIABLE INSTRUMENTS LAW INCLUDES—The chief provisions of the Negotiable Instruments Law may be classified under the following headings:

First—What is essential for the formation of a negotiable instrument or for a negotiable obligation on such an instrument?

Second—What is the full meaning of each con-

tract which is briefly stated on such an instrument. That is, what does a maker, drawer, acceptor, endorser in legal effect promise to do?

Third—What are the absolute and what the personal defences which may excuse a promisor from performing his promise?

Fourth—Who is a holder in due course, and therefore not subject to personal defences or equities?

With this introduction we may take up the examination of the language of the act, with appropriate explanation and illustration, of the several sections. The meaning of some is plain enough without comment. Others, though perhaps plain to a lawyer, assume a general knowledge of law and legal phraseology which one who is not a lawyer cannot be expected to possess.

CHAPTER II

Title I of the Negotiable Instruments Law

NEGOTIABLE INSTRUMENTS IN GENERAL

Article I—Form and Interpretation

12. SECTION 1.—[FORM OF NEGOTIABLE INSTRUMENT].—An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) Must contain an unconditional promise or order to pay a sum certain in money; (3) Must be payable on demand, or at a fixed or determinable future time; (4) Must be payable to order or to bearer, and (5) Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

NOTE.—In the Wisconsin Act the following is added: "But no order drawn upon or accepted by the treasurer of any county, town, city, village or school district, whether drawn by an officer thereof or any other person, and no obligation nor instrument made by any such corporatioin or any officer thereof, unless expressly authorized by law to be made negotiable, shall, or shall be deemed to be negotiable, according to the custom of merchants, in whatever form they may be drawn or made. Warehouse receipts, bills of lading and railroad receipts upon the face of which the words 'not negotiable' shall not be plainly written, printed or stamped, shall be negotiable as provided in section 1676 of the Wisconsin Statutes of 1878, and in sections 4194 and 4425 of these statutes, as the same have been construed by the Supreme Court."

13. THE INSTRUMENT MUST BE WRITTEN AND SIGNED AND MAY BE SEALED.—The first section of the statute states briefly the requisites of a negotiable instrument. The following sections elaborate some of the requirements here enumerated. Let us run over these. "It must be in writing and signed by the maker or drawer." That is simple. It may be written in pencil so far as its legal validity is concerned, and the substance upon which it must be written makes no difference, but it must be written and signed. "Signed" does not necessarily mean subscribed at the end of the paper, though that is the usual and proper method of signing. "John Smith promises to pay one hundred dollars to Thomas Brown or order" is a promissory note if the name of John Smith was written by him with intent to authenticate the instrument.

14. THE INSTRUMENT MUST CONTAIN AN UNCONDITIONAL ORDER OR PROMISE.—The second requisite is, "It must contain an unconditional promise or order to pay a sum certain in money." That is not so simple. The words "unconditional promise" refer to promissory notes; the requirement of an unconditional order relates to bills of exchange or checks. Suppose a draft in this form: an order on the drawee to pay a specified sum on a fixed day adding "charge the same to the $1,800 account." Is that unconditional? Yes, but compare with it the same case slightly changed: an order to pay on a fixed day "out of the $1,800 due

me." That last form is not an unconditional order because by its terms the order depends on there being $1,800 due the drawer. If there is nothing due him, nothing would be payable under the terms of the order. But in the instrument as we stated it at first there was an order to pay and then a request to charge to a special account. (See Section 3.) There is one form of instrument which under the statute is an unconditional order though it might not seem to be. Making an instrument payable at a bank is an order on the bank to pay the instrument, and makes it in effect a bill of exchange drawn on the bank. (Section 87.)

15. ASSIGNMENT OF CLAIM IS NOT A BILL OF EXCHANGE.—Sometimes we see an instrument in the form of an assignment by a creditor of a claim which he has against a debtor accompanied by an order to pay the claim so assigned to a certain payee or assignee. That is not a bill of exchange, even though the words "order" or "bearer" are inserted, because it is an assignment of a particular claim. If the claim is not good then the drawer does not demand payment; he only demands payment of the claim which he has against the drawee. The order is therefore conditional on his having a claim. On the other hand, if the order is unconditional it is immaterial, so far as the negotiability of the draft is concerned, that the drawer has no valid claim against the drawee and no right to draw on him. A check on a bank where the

drawer has no funds is as much a negotiable instrument as if he had funds, because the drawer does make an unconditional demand or order upon the bank. The promise in a note must be as unconditional as the order in a draft. It will not do to say, "I promise to pay the money in a certain event, or unless a certain event happens."

16. A NEGOTIABLE INSTRUMENT MUST BE FOR A SUM CERTAIN IN MONEY.—Another requirement of negotiability stated in subsection 2 is that the instrument must be for "a sum certain in money." That involves a consideration both of what is money and what is a sum certain. What is meant by a sum certain is partly defined in section 6, subsection 5, to which reference is made. The meaning of money as used in the law is ordinarily legal tender and except so far as section 6 modifies this rule of the Common Law, a negotiable instrument must be payable in legal tender. It will in effect be so payable if the instrument simply promises a stated sum of money, without stating in what medium the sum is to be paid; but a promise to pay in bank notes is not a promise to pay legal tender. Whether an instrument so payable may be negotiable is discussed under section 6.

17. THE INSTRUMENT MUST BE CERTAIN IN TIME OF MATURITY.—The third subsection provides that the instrument "must be payable on demand or at a fixed or determinable future time." Generally, instruments are payable

either at a fixed time or on demand, but sometimes bills of exchange are payable a fixed number of days after sight. When such a bill will become due is not fixed when the instrument is issued, but it can be fixed by presenting the instrument and starting the days to run. You cannot tell when you look at the instrument just how soon it will be due, but the holder can make it become due within the given number of days after sight by formally presenting the instrument. The time is therefore determinable. Section 4 of the Law further defines what is meant in section 1 by "a fixed or determinable future time."

18. WORDS OF NEGOTIABILITY ARE NECESSARY.—Subsection 4 provides that the instrument "must be payable to order or to bearer." It does not matter whether the instrument reads "to the order of A" or "to A or order." Legally those mean the same thing. It may be to the order of two or more jointly or to the order of any one or more of several. It may be to the order of the holder of an office for the time being (Section 8). It does not matter whether it is simply "to bearer" or whether it is to "A or bearer." The definition of an instrument payable to bearer is further enlarged by section 9. To illustrate what has been said, that the obligations of the different parties to a negotiable instrument are separate contracts, we may suppose the case of a note, non-negotiable because of the omission of the words "order" or "bearer"

but indorsed by the payee in terms "to the order of" an indorser. The payee's indorsement is a negotiable contract, though the contract of the maker of the note is not.

19. THE DRAWEE MUST BE INDICATED. —Finally the last subsection of section 1 provides that the instrument, if a bill of exchange, must be addressed to a drawee indicated with reasonable certainty. But it may be addressed to two or more persons as joint drawees. (Section 128.) If the drawer and drawee of a bill are the same person, the instrument is in legal effect a promissory note and may be treated either as a bill or note. (Section 130.) There may also be in a bill a kind of subsidiary drawee, called a referee in case of need. If the drawee does not pay, the holder of the bill may call upon this referee. (Section 131.)

20. SECTION 2.—[CERTAINTY AS TO SUM; WHAT CONSTITUTES.] The sum payable is a sum certain within the meaning of this act, although it is to be paid: (1) With interest; or (2) By stated instalments; or (3) By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due; or (4) With exchange, whether at a fixed rate or at the current rate; or (5) With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

NOTE.—In the Acts of Idaho, Iowa and North Carolina, the words, "Or of interest" are omitted from Subsection (3). In Nebraska, North Carolina and South Dakota, there are provisions that nothing in the Act shall be construed as authorizing the enforcement of a stipulation for attorney's fees.

21. WHAT IS A SUM CERTAIN.—We have considered what is meant by money. What is meant by a "sum certain" is defined in section 2 to some extent. The first two subsections state what would without any statute have been obvious. As the rate of interest is fixed by the instrument the exact sum which will be due at maturity can be calculated by any one at any time. And the sum is equally definitely fixed though payable in instalments. The third subsection is not quite so clear. It may be thought that if such an instrument is open to any objection, it is rather open to the objection that it is not payable at a fixed time, (for, as we shall see, that also is one of the requisites of negotiability), than to uncertainty of the amount. But a change in time of maturity will also involve a change in the amount due at maturity. However, the statute solves our difficulty. The sum is certain within the meaning of the statute though the instrument is payable with exchange, either at a fixed rate or at the current rate. It is certain though payable with the cost of collection, or with an attorney's fee if payment is not made at maturity. In these cases the sum is not really certain, but the net recovery which the holder will realize is certain, and that has been thought sufficient; but a provision in a note that it shall be subject to the payment of an attorney's fee when the note is unpaid and placed in the hands of an attorney for collection, whether the note is then due or not, is not within the protection

of the statute and would not be negotiable, since the sum is made uncertain.

22. ATTORNEY'S FEES.—The provisions of the statute in regard to attorney's fees has not altogether set at rest, however, a conflict of authority which existed prior to the passage of the Negotiable Instruments Law. Before the passage of that statute four views were taken by different courts: (1) that the contract for attorney's fees was valid and the instrument was negotiable; (2) that the provision was a valid simple contract between the parties but destroyed negotiability of the instrument; (3) that the provision was void and contrary to public policy, but being void did not affect negotiability; (4) that the usury laws prevented any fee which would make the total charge over and above the face of the note exceed the highest rate of interest allowed by the statute. The Negotiable Instruments Law makes it clear, where it is enacted, that the provision does not destroy negotiability, but whether the effect of the statute by implication is to make valid a provision which previously was void has been the subject of conflicting decisions. In Ohio and West Virginia, the Supreme Courts have held that the provision is void, though the note is negotiable. A contrary view has been taken by the Supreme Courts of Colorado and Virginia, that is that the provision is valid and the note negotiable. In Nebraska, North Carolina and South Dakota, the statute itself contains provisions that the act shall

not be construed as making valid a stipulation for attorney's fees.

23. SECTION 3.—[WHEN PROMISE IS UNCONDITIONAL.] An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional.

24. INDICATION OF A PARTICULAR FUND IS UNOBJECTIONABLE.—We have seen that a promise or order to pay which is dependent on the existence or sufficiency of a fund or credit cannot be negotiable, but a statement of the fund or account to which the payment is to be charged is not objectionable for the sum is to be paid irrespective of whether the fund or credit is sufficient to meet the charge.

25. STATEMENT OF THE TRANSACTION GIVING RISE TO THE INSTRUMENT.—One matter in regard to the unconditional quality of the promise required in a note may be worth mentioning. It is provided in section 3 (2) that it does not make an instrument non-negotiable if it contains a statement of the transaction which gave rise to the instrument. Suppose this case: a note in ordinary form adds these words, "This note was given for a horse, the title to which is to remain in the seller

until this note is paid." The Massachusetts court and some other courts held, before the passage of the Negotiable Instruments Law, that that note was not negotiable, on the ground that if the horse should die the maker of the note would not have to pay it, since there would be what is called "failure of consideration," for the note when the horse for which it was given died, and any purchaser of the note would have notice from its terms of this possibility. Other courts held that the buyer of a horse under those circumstances would have to pay the price even though the horse died. The Massachusetts court under its view held such a note non-negotiable, since in effect it was conditional; the other courts held it was unconditional and negotiable, and it looks as if the same controversy might arise under the present act. There certainly is no harm in stating the transaction which gave rise to the instrument if nothing further is added, that is, it will do to say, "This note was given for a horse," or, "This note was given for a ditch," but probably it would not do to add to a note, "This note was given for a horse and is not to be paid if the horse dies," nor, "This note is given for a ditch to be dug and is not to be paid unless the ditch is dug," for when you add those last words you do indicate that there is a condition to the promise of the maker and that he is not to pay in every event. Now if that condition is implied it must be just as bad as if it is expressly stated. Suppose the addition, "This note is given

for a ditch to be dug." Does that carry with it the implication that unless the ditch is dug the maker is not going to pay? It certainly suggests that implication, and if so, it would seem that the note was conditional and not, therefore, a negotiable instrument. It is, of course, not necessary that an instrument should state the transaction which gave rise to it, or even that it was given for value [Section 6 (2)].

26. SECTION 4.—[DETERMINABLE FUTURE TIME; WHAT CONSTITUTES.] An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: (1) At a fixed period after date or sight; or (2) On or before a fixed or determinable future time specified therein; or (3) On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable and the happening of the event does not cure the defect.

NOTE.—In the Wisconsin Act instead of the last paragraph, the following is inserted: "(4) At a fixed period after the date or sight, though payable before then on a contingency. An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect, except as herein provided."

27. CERTAINTY OF TIME OF PAYMENT. —The typical negotiable instrument is payable at a fixed day in the future, as on July 1, 1916, or in three months from date. An instrument payable on demand or at sight or at a fixed period after demand

or sight involves a little extension of the principle of certainty, since no one can tell exactly when demand will be made, but as the holder can make the time certain by making demand, the value of such an instrument is exactly calculable, and there has never been any question that such instruments are negotiable. But the statute allows negotiability to some instruments where there was doubt at common law, though the statute has followed what was previously the weight of authority. An instrument may be payable "on or before" a fixed or determinable future time. Therefore, a note payable on or before July 1 is a negotiable instrument. If this means at the option of the holder there would be no more lack of certainty than in demand paper since in effect the instrument would be payable on demand prior to July 1, and if no prior demand were made, then on that day. But the option is that of the maker, and it is impossible for the holder to tell whether the option will be exercised. Still he knows the exact day when at latest the instrument is payable. A further latitude, however, is allowed by the enactment in subsection 3 that an instrument is negotiable though it is payable on an event "which is certain to happen, though the time of happening be uncertain." That, it seems, is an objectionable provision, and the only reason that the objection is not more apparent is because the case which is permitted is such a rare one. A common illustration given is a note payable on a man's death; that is a time

certain to happen, but the time of happening is uncertain. Now such a note is wholly unsuited for the purpose of negotiable instruments. Negotiable instruments are intended as a kind of adjunct to money, as something that has a definite value and which can be dealt with on that assumption. It is because of this idea, that negotiable instruments are a kind of adjunct to money, that all these requirements which we are considering as to certainty of the promise, the certainty of the time and the certainty of the medium of payment are made. But an instrument payable at a man's death is, of course, of speculative value. It is customary to contrast with such an instrument an instrument made by a bachelor payable on his marriage. That is not certain to happen; he may never marry, and therefore such an instrument is not negotiable, even under the broad words of the Negotiable Instruments Law. So a draft payable on the arrival of certain goods is not negotiable. The goods may never arrive.

28. SECTION 5.—[ADDITIONAL PROVISIONS NOT AFFECTING NEGOTIABILITY.] An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which: (1) Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) Authorizes a confession of judgment if the instrument be not paid at maturity; or (3) Waives the benefit of any law intended for

the advantage or protection of the obligor; or (4) Gives the holder an election to require something to be done in lieu of payment of money. But nothing in this section shall validate any provision or stipulation otherwise illegal.

NOTE.—In the Illinois Act, the words "under this Act," are added at the end of the first sentence. The effect of this insertion is that the peculiar law previously in force in Illinois allowing negotiability to promises for the delivery of other things than money still remains in force after the enactment of the Negotiable Instruments Law. In the Illinois Act, also the words "if the instrument be not paid at maturity," are omitted from subsection (2). In the Kentucky Act subsection (3) is omitted. In the Wisconsin Act the words: "Or authorize the waiver of exemptions from execution," are added at the end of the section.

29. THERE MUST BE NO ADDITIONAL ORDERS OR PROMISES.—After the requirements in the earlier sections of what a negotiable instrument must contain, section 5 provides what it must not contain. There must not be any other additional order or promise. The reason for this is the same as for all the formal requisites of bills and notes—namely that the face of the instrument may show plainly an obligation, the pecuniary value of which can be calculated. The rule forbidding additional orders or promises, which is taken by the statute from the common law, becomes quite important in regard to some of the collateral notes which are used.

30. ADDITIONAL POWERS MAY BE GIVEN.—Section 5 authorizes several provisions in a note as to which there had been some litigation

prior to the enactment of the Negotiable Instruments Law. Thus a power in the instrument to sell collateral securities in case the instrument is not paid at maturity does not interfere with negotiability, nor does a power to confess a judgment if the instrument is not paid at maturity, but that is unimportant in some States because their law does not allow a confession of judgment beforehand by a debtor as part of an obligation, whether negotiable or not. In other States, however, a debtor can give his creditor at the time the debt is created a power authorizing the clerk of court to enter judgment against him, whenever the creditor may request. It is also not destructive of negotiability for the maker or drawer to waive the benefit of any stay or exemption law. That provision too is unimportant in some States because they do not allow such exemptions as the law gives to a debtor to be waived in advance. Nor is it objectionable that the note gives the holder an election to require something to be done in lieu of the payment of money. That last provision seems a considerable addition to mercantile theory. Suppose a promise or order to pay A $100, or at A's election to build a bay window on his house. Such an alternative seems rather foreign, perhaps, to the idea that negotiable instruments are things of a fixed value current as an adjunct to money, but you will observe that it is the holder who has the option and the holder can always demand money, and therefore can properly fix a

value on that note as if it were simply for $100. If the option is given to the maker of the instrument it destroys negotiability.

31. ILLUSTRATIONS OF ADDITIONAL PROMISES WHICH DESTROY NEGOTIABILITY.—Now these additions, of which we have spoken, to the promise in the note or order in the bill are all additional powers given to the holder rather than additional promises made by the maker, and the purpose of these powers is to make more certain of performance the main promise to pay. Let us suggest in contrast some additional promises made by the maker. A maker signs a note which includes this statement: "There is deposited to secure this note 100 shares of New York Central, and if at any time this security shall be deemed by the payee of the note insufficient collateral, I promise to deposit further collateral." That instrument would not be negotiable. There is in addition to the promise to pay money a promise to deposit further collateral, and we suppose any collateral note in which the maker promises to do other things than to pay the amount of the note is not a negotiable instrument. Powers given to the holder of the instrument to sell the collateral would not render the instrument non-negotiable. A power, however, to declare the instrument due might be regarded as more objectionable, but probably even that would be held to come within the provision of the statute which says that an instrument payable

on or before a fixed date is valid. In a recent case there was a stipulation on the back of a note that it was secured by collateral and that the payee agreed to look to this security for its payment. It was held that that provision written on the note rendered it non-negotiable. It was in fact not a promise to pay at all events, but a promise to pay out of a particular fund, and if the fund proved insufficient by the terms of the promise nothing would be due.

32. SECTION 6.—[OMISSIONS; SEAL; PARTICULAR MONEY.] The validity and negotiable character of an instrument are not effected by the fact that: (1) It is not dated; or (2) Does not specify the value given, or that any value has been given therefor; or (3) Does not specify the place where it is drawn or the place where it is payable; or (4) Bears a seal; or (5) Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument.

NOTE.—In the Illinois Act the following words are inserted at the beginning of subsection (5). "Is payable in current funds: or", and that Act also does not contain the final paragraph of the section.

33. DATE OF A NEGOTIABLE INSTRUMENT.—The lack of a date is unimportant in an instrument unless it is in terms payable a certain period after date. If an instrument in this form were undated it would be an incomplete instrument which would have to be dealt with as provided in section 13.

34. VALUE RECEIVED.—Negotiable instruments usually state that they are for value received and this mode of expression is of great antiquity. The original theory of a bill of exchange, which was the earliest form of negotiable instrument, was based on the assumption that the purpose of the parties was to exchange a sum of money actually received by the drawer at his residence for a sum of money to be paid by the drawee at another place. Nevertheless, in recent times at any rate, even apart from statute, it has not been necessary to insert either such a general statement of consideration as the words for "value received," or a particular statement of the actual consideration given. The last paragraph of section 6 refers to certain special statutes in a number of States requiring that notes given for a patent right shall so state, and there are other statutes in a few jurisdictions requiring a statement of the consideration in notes given for lightning rods, or stallions, or to pedlers. Such statutes, however, are distinctly exceptional.

35. PLACE OF DRAWING OR PAYMENT.—A negotiable instrument need not state where it is drawn or where it is payable, because in the absence of such a statement the law is able to determine the place with accuracy. A bill is drawn or a note is made where it is delivered. It is payable at the usual place of business or residence of the person who should make payment. (See section 133.)

36. SEAL AND NEGOTIABILITY.—It was a

rule of the common law that a sealed instrument could not be negotiable. This was due to the fact that under the custom of merchants from which the law of bills and notes developed, such instruments were not sealed. When, however, business corporations became common as they did for the first time in the nineteenth century, and especially when it was desired to issue series of bonds which should be payable to bearer and negotiable, the common law rule caused trouble. Some courts without the aid of statutes declared that mercantile custom had extended itself so that bonds payable to bearer became negotiable within the custom of merchants. But the matter was not so free from doubt, as a general proposition, as could have been wished. Subsection 4 of this section, however, settles the matter.

37. INSTRUMENTS PAYABLE IN CURRENCY.—An instrument is none the less negotiable because it "designates a particular kind of current money in which payment is to be made;" that is, a negotiable instrument may be payable in any kind of current money, as in gold or in $1 bills or other current money. But what does current money mean? Prior to the passage of the Negotiable Instruments Law there was considerable litigation on the question whether an instrument payable in currency or in current funds was negotiable. Some courts held that currency or current funds meant the money or legal tender that was current, and therefore, that the instrument was negotiable.

Other courts said that currency or current funds meant what was current as money, that is, used as such; whether, in fact, it was money or not. It seems probable that the latter meaning is really the true sense of the words, and under that meaning if it is requisite that a negotiable instrument shall be payable in money, an instrument payable in currency or current funds is not negotiable. It is probable that the Negotiable Instruments Law was meant to settle this controversy when it provided that an instrument is negotiable though it designates a particular kind of current money in which payment is to be made; but it cannot be said that those words do settle the controversy. "Current money" as used in the statute does not seem the equivalent of "currency or current funds," if the latter words are understood to mean what is used as money whether it is really money or not. The Supreme Court of Iowa, indeed, has held that a check payable in current funds is not payable in money and is therefore not negotiable. It has been suggested that this section of the Negotiable Instruments Law be universally amended as it has been in Illinois, so that the subsection in question shall read that the negotiable character of an instrument shall not be affected by the fact that it is payable in currency or current funds, or designates a particular kind of current money in which payment is to be made. In the meantime it is safer not to accept as negotiable any

instrument expressed as payable in currency or current funds.

38. SECTION 7.—[WHEN PAYABLE ON DEMAND.] An instrument is payable on demand: (1) Where it is expressed to be payable on demand, or at sight, or on presentation; or (2) In which no time for payment is expressed.

Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand.

39. WHEN AN INSTRUMENT IS PAYABLE ON DEMAND.—It has already been said that an instrument may be payable on demand. Section 7 of the statute provides that an instrument is payable on demand whether it is expressed to be so payable or at sight or on presentation, also when no time of maturity is expressed in an instrument or when it is negotiated after maturity. By a later amendment to the Negotiable Instruments Law the Massachusetts statutes have revived the sight draft as a distinct form of instrument, and the same thing has been done in New Hampshire and North Carolina, but not generally. The only distinction between a sight draft and a demand draft in these States is that a sight draft is entitled to three days grace, while neither demand paper or time paper under the Negotiable Instrument Law is so entitled. Under the Negotiable Instruments Law itself the sight instrument is made identical with the demand instrument.

40. RIGHTS AGAINST PARTY TO OVERDUE PAPER.—Negotiable paper is not often issued or accepted when on its face overdue, but it is entirely possible and the statute in section 7 (2) provides for it. Indorsement of overdue paper, however, is common enough. The indorsee is not a holder in due course, and takes subject to defences, but he has rights against his indorser. In effect the indorsee has, so far as this last indorser is concerned, a right to treat the instrument as the indorsement of a new demand note, which may be presented within a reasonable time after the indorsement, even though it had been previously presented and dishonored, and may charge this indorser if the note is not paid on the subsequent presentment though other indorsers whose names were on the instrument before the dishonor would be discharged if due diligence had not previously been exercised.

41. SECTION 8.—[WHEN PAYABLE TO ORDER.] The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of: (1) A payee who is not maker, drawer, or drawee; or (2) The drawer or maker; or (3) The drawee; or (4) Two or more payees jointly; or (5) One or some of several payees; or (6) The holder of an office for the time being.

Where the instrument is payable to order the payee must be named or otherwise indicated therein with reasonable certainty.

NOTE.—In the Illinois Act after subsection (6) is inserted: "(7) An instrument payable to the estate of a deceased person shall be deemed payable to the order of the administrator or executor of his estate."

42. WHO MAY BE A PAYEE.—An instrument payable to A, or order, or payable to the order of A, is identical in legal effect; though an instrument in the latter form literally does not say that there is any payee until A makes an order to pay to someone yet A is legally the payee. Not infrequently instruments are made payable on their face to the order of the maker himself, but an instrument in this form is not really a completed instrument, it only becomes so by endorsement; if the endorsement is to a particular person that person is in effect the payee of the instrument. If the indorsement is in blank the instrument is payable to bearer. Other kinds of payees besides those enumerated in section 8 are those enumerated in subsections 3 and 4 of the following section.

— Subsection 6 of section 8 changed the previously existing rule of the Common Law. Until the passage of the Negotiable Instruments Law a bill or note payable to the "Treasurer of the A Company" was payable to the person who was treasurer at the time the instrument was delivered, and though he ceased to be treasurer, the instrument was still payable to him, and he alone could indorse it. Now such an instrument would be payable in effect to the office of treasurer and whoever held that office at any time could indorse as treasurer.

43. SECTION 9.—[WHEN PAYABLE TO BEARER.] The instrument is payable to bearer: (1) When it is expressed to be so payable; or (2) When it is payable to a person named therein or bearer; or (3) When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or (4) When the name of the payee does not purport to be the name of any person; or (5) When the only or last indorsement is an indorsement in blank.

NOTE.—In the Illinois Act subsections (3) and (5) are as follows: "(3) When it is payable to the order of a person known by the drawer or maker to be fictitious or nonexistent, or of a living person not intended to have any interest in it." "(5) When, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee."

44. FICTITIOUS PAYEES.—The first two subsections of section 9 present no difficulty but the enactment in subsection 3 that an instrument is payable to bearer when by its terms it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable, needs some comment. Let us illustrate that situation a moment: a firm in New York has an employee whose duty it is to buy goods, verify the bills for the goods, draw checks payable to the sellers of the goods, and bring the checks to the members of the firm for signature. This employee, desiring to commit a fraud, pretends that certain lots of goods have been received, and draws checks which he presents to his employer for signature, gets them signed, then indorses them and obtains

the money. Now are those checks payable to bearer? If so, the bank which paid them has made a good payment. If they are not payable to bearer, however, unless they are properly indorsed, the bank which pays them is not entitled to charge the payment against its customer's account. They are not payable to bearer because, if the person to whom they were payable was fictitious, that was not known to the drawer, the person making them so payable. Whether they were payable to the employee himself, so that his indorsement of them is valid, is then the question. He intended that the check should be used by him and in effect he intended to be the payee, but the drawer did not intend to make him so. We may suppose that the drawer in signing a check payable to X Y for goods had in mind that there was a genuine firm of that name or he would not have signed the check. If in fact there was a genuine person or firm it alone could indorse; if there was not a genuine firm, then nobody could indorse. The instrument would not be payable to bearer because the drawer did not know that the payee was fictitious. It would not be payable to the fraudulent clerk, or to any other existing person, because the drawer did not intend that the check should be payable to him.

45. OTHER INSTRUMENTS PAYABLE TO BEARER.—Section 9 also enumerates as payable to bearer an instrument where the payee does not purport to be the name of any person, as "cash;"

and finally, where the only or last indorsement is an indorsement in blank. This provision involves at least an apparent conflict with section 40 of the act. Section 40 provides that if an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery. Suppose, then, an instrument is payable to bearer on its face, the holder of it indorses it specially to Y; Y loses the instrument, it is found by W, who sells it before maturity to Z, an innocent holder. Can Z sue on that instrument in spite of the fact that it is specially indorsed to Y? It would seem under section 40 that he can. The instrument, though payable to bearer and specially indorsed, may nevertheless be further negotiated by delivery. Contrast with that case the following: an instrument payable to the order of A on the face is indorsed by A in blank, and a subsequent holder, B, indorses specially to C; that instrument is also lost and picked up and sold to Z, a bona fide purchaser. Can Z here disregard the special indorsement and go back to the blank indorsement and claim under that as on an instrument payable to bearer? It seems he cannot do that, for section 9 (5) says an instrument is payable to bearer when the only or last indorsement is an indorsement in blank. In this case the last indorsement was a special indorsement; accordingly, the instrument when sold to Z was no longer payable to bearer, and Z, therefore, would have to get the indorsement of the special indorsee in order to get

title. Section 40 probably does not affect this case, because the instrument was on its face payable to order—not to bearer. In other words, Sections 40 and 9 (5) can only be made to avoid a contradiction of one another by confining the application of Section 40 to instruments payable on the face to bearer and by holding such instruments as are covered by Section 9 (5) not included. On strict theory a blank indorsement is a blank power authorizing the holder to insert his own name or that of anyone else as indorsee, but under the statute a blank indorsement is a little more than that; it is making the instrument payable to bearer, though the holder by inserting the name of himself or of another person in the blank space above the indorsement name may change the instrument from one payable to bearer to one payable to a special indorsee or order.

The only practical difference between treating an instrument with a blank indorsement as payable to bearer or as giving a power to any holder is merely that on the latter supposition the instrument is incomplete until the power is exercised and the blank would have to be filled in before the holder could sue.

46. SECTION 10.—[TERMS WHEN SUFFICIENT.] The instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements hereof.

47. SECTION 11.—[DATE, PRESUMPTION AS TO.] Where the instrument or an acceptance

or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance, or indorsement as the case may be.

48. INSTRUMENT TAKES EFFECT FROM DELIVERY.—Though the date written on a negotiable instrument is often important, it should be remembered that the instrument takes effect not from the day it bears date, but from the day of delivery, and this is true of any obligation upon a negotiable instrument, whether that of maker, drawer, acceptor or indorser.

49. SECTION 12.—[ANTE-DATED AND POST-DATED.] The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

50. FRAUDULENT ANTE-DATING OR POST-DATING.—This section suggests but does not answer the question, what is the effect of ante-dating or post-dating an instrument for an illegal or fraudulent purpose. The implication from the section would be that such an instrument was invalid, but its invalidity could probably not be set up against a holder in due course. Suppose a note actually made and delivered on Sunday is ante-dated or post-dated so that it shall appear to have been made on Saturday or Monday. In a jurisdiction where the Sunday law forbids doing business on that day,

doubtless the instrument could not be enforced between the original parties, but one who purchased the instrument having no knowledge of the facts would certainly be justified in relying on the date as written. The mere fact that an instrument is post-dated does not prevent one who takes it with knowledge of the fact from being a holder in due course.

51. SECTION 13.—[WHEN DATE MAY BE INSERTED.] Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date.

52. INSERTION OF WRONG DATE.—No question is likely to arise under this section where the true date is inserted after the issue of the instrument. The final sentence of the section, however, suggests an inquiry. The implication of the sentence is that the insertion of a wrong date will avoid an instrument in the hands of the original person who made the insertion; or in the hands of any one taking from him with notice or after maturity, for such a person is not a holder in due course. This seems a heavy penalty if the erroneous date was inserted without fraudulent intent, and on the sup-

position that the date inserted was the true one. The moral to be drawn is that a date should not be inserted in an undated instrument unless one is perfectly sure that the insertion represents the true date.

53. SECTION 14.—[BLANKS; WHEN MAY BE FILLED.] Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

NOTE.—In the Illinois Act the words "issued or" are inserted before "negotiated" in the last sentence. In the Wisconsin Act the words "prior to negotiation" are inserted before the words "by filling;" and the words "prima facie" in the middle of the section are omitted.

54. FILLING BLANKS.—This section deals generally with the problem of which one application was discussed under the preceding section with reference to an omission of the date. By fil-

ling in a blank we do not mean filling in a space carelessly left in the place where the amount of the instrument is written, but the filling in of a space intentionally left. The statute makes express provision for this sort of thing in sections 13, 14, 15 and 138. In substance, the effect of these sections is that any holder in due course who takes the instrument after it has been completely filled in can enforce it. The person who left the blanks is bound by the way they are filled in so far as the holder in due course is concerned, but any one who took the instrument while there were still blanks in it must at his peril find out what the actual authority is to fill in the blanks, and he can only recover to the extent that actual authority was given to fill in the blanks. The troublesome case is where the holder takes the instrument after the blanks have been filled in, but knowing that there had been blanks. Is that person bound to find out at his peril what the original authority was? That seems on the wording of the statute a doubtful case. These are the facts of a case that arose in England: the defendant signed blank forms of promissory notes and left them with his attorney, giving, however, the attorney no authority to complete and issue these notes until instructed by telegraph or letter from the maker. Nevertheless, the attorney, without further instruction, filled up the blanks, making the plaintiff the payee of the notes. The plaintiff bought the notes in good faith and for value, but he knew,

nevertheless, that they had been signed in blank and had been left with the attorney; but the payee supposed the attorney was following the directions which had been given him by the maker. The plaintiff made no inquiry in regard to the attorney's authority. He took it for granted that the attorney was acting properly. The English court held that the maker was not liable on those instruments. It seems like a pretty hard decision. Perhaps it might not be followed in this country. Nevertheless, the fact that there has been one such decision, and a decision under the English statute, which is identical with the American Negotiable Instruments Law, in the provisions controlling this question, makes the probability rather that way.

55. SECTION 15. — [INCOMPLETE INSTRUMENT NOT DELIVERED.] Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

56. LACK OF DELIVERY AN ABSOLUTE DEFENCE TO AN INCOMPLETE INSTRUMENT.—This section should be contrasted with the following one. Lack of delivery of a completed instrument does not excuse one whose name is attached to it. There is only what we have called a personal defence or equity which will not be available against a holder in due course. But if the instrument is incomplete it cannot be made

valid even in the hands of such a holder. In other words when we attach our names to a completed instrument we must guard it at our peril. Even if stolen from us we may be made liable upon it; but while it is incomplete we run no such risk.

57. SECTION 16.—[DELIVERY: WHEN EFFECTUAL: WHEN PRESUMED.] Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

NOTE.—In the North Carolina Act the word "accepting" is omitted from the second sentence. In the Kansas Act the third sentence of the section is omitted.

58. LACK OF DELIVERY OF A COMPLETE INSTRUMENT IS A PERSONAL DEFENCE. —Though the opening sentence of this section says delivery is essential, a later sentence says that when

in the hands of a holder in due course an instrument is "conclusively presumed" to have been delivered. That means that even though there was no delivery there will be liability to a holder in due course. The result of the section is that a party whose signature is on an instrument but who never delivered the signed instrument has a personal defence or equity but nothing more.

59. SECTION 17. — [CONSTRUCTION WHERE INSTRUMENT IS AMBIGUOUS.] Where the language of the instrument is ambiguous or there are omissions therein, the following rules of construction apply: (1) Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount; (2) Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof. (3) Where the instrument is not dated, it will be considered to be dated as of the time it was issued; (4) Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail; (5) Where the instrument is so ambiguous that there is doubt whether it is a bill or note, the holder may treat it as either at his election; (6) Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser;

(7) Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

NOTE.—In the North Carolina Act subsection (2) is omitted. In the Wisconsin Act is added: "(8) Where several writings are executed at or about the same time, as parts of the same transactions, intended to accomplish the same object, they may be construed as one and the same instrument as to all parties having notice thereof."

60. RULES OF CONSTRUCTION.—The provisions of this section are in the main self explanatory. The figures which it is customary to put in a bill or note to indicate the amount are not regarded strictly as part of the instrument. If the amount is also written out in words the figures are considered merely a memorandum. The 4th sub-section states a rule of construction that is applicable not only to bills and notes but to all written contracts. The rule rests on the natural supposition that the parties are more likely to have overlooked or misread the printed matter in the form which they used than they are to have written what they did not intend. The typical case, which gave rise to the 5th subsection, presented an instrument in this form, "On demand I promise to pay B, or bearer, the sum of £15 value received." This was signed and addressed to J. Bell, to whom it was presented, and who wrote upon it "accepted, J. Bell." It was held that Bell was liable as an acceptor of a bill though the holder might, had he chosen, have sued the original signer of the instrument as the maker

of a promissory note. The 7th subsection follows the rule of the common law. The instrument as written is self contradictory, being signed by several persons, but beginning "I" promise to pay. If it read "we promise to pay," the obligation would be joint; that is, all the parties would have to be joined in an action. The use of the word "I," however, is thought to indicate an intent that each person shall be severally liable; therefore the makers of such an instrument may all be sued jointly or each of them may be sued separately.

61. SECTION 18.—[LIABILITY OF PERSON SIGNING IN TRADE OR ASSUMED NAME.] No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name.

62. FORM OF SIGNATURE.—This section applies to negotiable instruments a rule which the common law applied to sealed instruments but did not apply to oral contracts or to informal written contracts, namely, that a person who has ostensibly contracted could not be shown to have been an agent for a principal whether the principal was disclosed or undisclosed. If, on behalf of his principal, an agent enters into a simple contract with another person, the latter can charge the principal on the agent's contract even though the agent did not announce that he was acting on behalf of his

principal, and this fact was wholly unknown at the time to the person with whom he dealt. On the other hand in sealed instruments and in negotiable instruments, the person who signs the documents is the only party liable, and it is immaterial that the payee or other holders of the instrument know that he signed the instrument on behalf of his principal and in his principal's business. A name may be signed by mark or by any assumed name. It is sometimes supposed that we cannot change our names without the authority of court or legislature, but in fact anybody can assume any name he pleases; at least if he does so without fraudulent intent. It may take some time for an assumed name to become known as his, so as to give him a right to complain if other persons do not identify him as the one intended by the name, but he will incur liability without difficulty the very first time he uses an assumed name if he signs it to an obligation.

63. SECTION 19. — [SIGNATURE BY AGENT; AUTHORITY; HOW SHOWN.] The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

NOTE.—In the Kentucky Act instead of this section it is provided that: "The signature of any party may be made by an agent duly authorized in writing."

64. WHEN A SIGNATURE BY AN AGENT BINDS THE PRINCIPAL.—An agent may bind his principal by signing negotiable paper if (1) the agent had actual or apparent authority so to do, and (2) exercises the authority by a form of signature sufficient to charge the principal. A signature of the principal's name by the agent without any indication that the name was signed by an agent is sufficient, though business propriety requires that the instrument should state that the principal's name was signed "by A. B. Agent." A signature of the agent's name followed by the words "on account" of a named principal makes the instrument the obligation of the principal, so if made on "behalf of" or "for" a named principal.

65. SECTION 20.—[LIABILITY OF PERSON SIGNING AS AGENT, ETC.] Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

NOTE.—In the Virginia Act after the word "capacity" the words "without disclosing his principal" are inserted.

66. DESCRIPTIO PERSONAE.—In contrast with the cases referred to under the previous sections are to be noted numerous cases where it is held that the mere addition of the word "agent" or

such official designation as "President," "Treasurer," "Trustee," in the absence of words in the body of the instrument showing a different intent does not make the instrument the obligation of the principal or corporation, but the obligation is that of the agent or official personally. The addition to the signature is treated as matter of description like "Colonel" or "Professor." This result doubtless violates the intention of the parties in most instances. The reason for its adoption is because if the agent were not held personally liable, no one would be liable. The principal could not be because he is not named in the instrument, and, as has already been said, no one whose signature does not appear on the instrument can be held liable upon it. If, however, the body of the instrument states the name of the principal the signature "A. B. Agent," will make the obligation that of the principal, not of the agent.

67. SECTION 21.—[SIGNATURE BY PROCURATION; EFFECT OF.] A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority.

68. PROCURATION.—In regard to signature of agents generally, it is the rule that the principal is bound not only when the agent had actual authority to execute the instrument in question, but also where he had apparent authority. Where, however,

the agent's signature is made per procuration, apparent authority is insufficient; nothing but actual authority will bind the principal.

69. SECTION 22.—[EFFECT OF INDORSEMENT BY INFANT OR CORPORATION.] The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.

70. ULTRA VIRES INDORSEMENT, BY A CORPORATION.—Prior to the passage of the Negotiable Instruments Law the rule in regard to the acts of corporations was this: If the corporation had not power to do a certain act or, in legal phrase, if its action was ultra vires, it was held by many authorities that the transaction was actually void. The corporation, therefore, would not be liable by virtue of the signature of its name, nor would the signature be effectual to transfer title to another. Section 22 of the statute, therefore, changes the law in these jurisdictions so far as the transfer of title to the instrument is concerned. Business corporations generally have power to enter into obligations on negotiable paper.

71. INDORSEMENT BY AN INFANT.—The case of an infant was a little different at common law from that of a corporation. An infant, that is a minor, at common law, could transfer title, but could avoid such a transfer unless after attaining his majority, he ratified the transfer. It is not clear

from the wording of the statute whether an infant has now lost his capacity to re-vest title in himself. Presumably the law is unchanged in this respect. Therefore, an instrument which has formerly belonged to an infant whose indorsement is necessary to complete the holder's claim of title, is not a desirable instrument to purchase.

72. SECTION 23.—[FORGED SIGNATURE; EFFECT OF.] When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

73. LACK OF GENUINENESS BECAUSE OF FORGERY.—Lack of genuineness of the instrument is an absolute defence. This may arise from several causes, for instance, forgery. This is referred to in section 23 of the statute, where it is expressly provided that when a signature is forged or made without authority it is not operative, unless the party against whom it is sought to enforce the instrument is precluded from setting up the forgery or want of authority. When is one precluded from setting up forgery or want of authority? Whenever he has led anybody to believe that the signature is genuine or authorized, and that person has

in reliance on the belief changed his position. Suppose this case. A's signature is forged, but he nevertheless when asked by some one if that is his note says, "Yes." Relying on that statement the inquirer purchases the note. A could not thereafter set up the defence of forgery. But suppose the purchaser purchased the note first, and having purchased it asked the maker if that was his signature. Here again the maker says, "Yes." In this case he will not be precluded for setting up the forgery because no action has been taken in reliance on his statement, and a forgery according to the weight of authority cannot be ratified or adopted by a mere assent to be bound, unless there has been a reliance on the adoption and a change of position. A drawee is also precluded from setting up, as a ground for recovering a payment, that the drawer's signature was forged.

74. SIGNATURE OF UNAUTHORIZED AGENT.—In that respect the case of forgery is different from another case of lack of genuineness, namely, where the instrument was made by an agent without authority. The principal may ratify the act of an agent without authority, and this ratification is good without consideration and without any reliance or change of position. Accordingly, if the purchaser of a note which purports to be made by A through an agent, asks A, after having purchased the note, "Was that agent authorized to sign this?" and A says either, "Yes, he was," or, "No, he

wasn't, but I ratify his act," A will be bound just as much as though he had made those statements before the purchaser bought the note and the purchaser had bought in reliance on the statement.

75. SIGNATURE OF UNAUTHORIZED CORPORATION OR OFFICER.—Another kind of lack of authority which also prevents an instrument from being genuine is where a corporation makes a note without authority. It may be that the corporation itself had no authority to make a note, that it was ultra vires in legal phraseology. Or it may be that though the corporation had power to make a note, the particular officer who attempted to bind the corporation did not have power to do so. In either case the corporation is not bound. There is an absolute defence, unless here also the corporation is precluded from setting up the defence by having induced a purchaser to believe that there was sufficient authority, and even if the corporation does induce a purchaser to believe there was authority, it cannot exceed the limits imposed upon it by its charter. A business corporation in general would have power to issue negotiable paper, but some kinds of corporations would not.

76. FORGED INDORSEMENT.—The commonest case where the holder has difficulty in making out title is where some indorsement is forged. It does not matter which indorsement if all are special indorsements. If any one is forged there can be no recovery. Suppose this case, how-

ever: an instrument payable to A or order is indorsed in blank by A, then there is a forged special indorsement to B, and subsequently a genuine indorsement of B to C. C can recover on that instrument because he can fill in his own name over the blank indorsement and strike out the subsequent indorsements. (Section 48.) Contrast with that case this: an instrument payable to A or order indorsed in blank by A and then specially indorsed by a genuine indorsement of the holder to B. B's indorsement is forged and then the instrument comes into the hands of C, a bona fide purchaser. In this case C cannot collect. He cannot write his name over the blank indorsement here because the subsequent genuine special indorsement restricts the negotiability of the paper, and it is necessary that there shall be a genuine indorsement from B in order to transfer title. In the first case the special indorsement being forged did not restrict the effect of the blank indorsement. If a payment is actually made on an instrument to one whose right is derived through a forged indorsement, the payment may be recovered. The case is different from that of a forged drawing. We have seen in paragraph 31 that the drawee in that case cannot recover back what he pays, but if the drawee pays an instrument to one who claims under a forged indorsement, he can recover his money back even from an innocent holder. The reason for the difference is that in the forged indorsement case the holder did not own the

instrument which was paid. The payment was due to somebody else. In the case of the forged drawing the holder who presented that draft had a poor thing, but it was his and if the drawee chose to honor it that was the drawee's lookout.

Article II—Consideration

77. SECTION 24.—[PRESUMPTION OF CONSIDERATION.] Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value.

78. CONSIDERATION IN NEGOTIABLE INSTRUMENTS AS COMPARED WITH THAT IN OTHER CONTRACTS.—The rule stated in this section differs from that which prevails in regard to simple contracts at common law. In regard to such contracts the rule was and still is in most States that even in case of a written contract which is not under seal, the promisee when suing the promisor must allege and prove sufficient consideration to support the promise; nothing is presumed in the promisee's favor. In a few jurisdictions this rule has been changed in regard to all written contracts making the rule similar in regard to such contracts with that stated in Section 24 of the negotiable instruments law. Though consideration is presumed prima facie to have been given for every obligation on a negotiable instrument, the

truth may be shown by any party, and if when shown it appears that no value or consideration in fact existed, the defence will be good as against any one but a holder in due course.

79. SECTION 25. — [CONSIDERATION, WHAT CONSTITUTES.] Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time.

NOTE.—In the Wisconsin Act the words "discharged, extinguished or extended" are inserted after the word "debt," and at the end of the section is added: "But the indorsement or delivery of negotiable paper as collateral security for a pre-existing debt, without other consideration, and not in pursuance of an agreement at the time of delivery, by the maker, does not constitute value."

80. WHAT IS SUFFICIENT CONSIDERATION IN SIMPLE CONTRACTS.—As to what is consideration, the rules of negotiable paper are in general identical with those of simple contracts, and it is, therefore, necessary to define briefly, what consideration is necessary to make a simple contract binding—that is, what is necessary to make an ordinary promise legally enforceable as a contract. The promisee must give something or promise to give something to the promisor in exchange for his promise which he has assented to receive as the price for his promise; and the thing so given or promised as consideration must be something to which the promisor was not previously entitled. Doing or promising to do something which one was

previously legally bound to do is not sufficient consideration. The thing given or promised as consideration need not, however, be tangible, it may be the surrender of a right or the forbearance to enforce a claim; but the surrender of a claim known to be invalid or the forbearance to prosecute a claim known to be unfounded is insufficient.

81. SATISFACTION OF AN ANTECEDENT DEBT IS SUFFICIENT CONSIDERATION.—There are some differences, however, between the rules of consideration for negotiable paper and for ordinary simple contracts. In the first place, a negotiable instrument may be given for an antecedent or pre-existing debt. That is not so in the case of simple contracts. When we owe a debt and say verbally, "We promise to pay that," or make such a promise in writing, we could not be sued on the promise. The old obligation, of course, still exists, but the new promise creates no new liability, because nothing new is given in exchange for it. But in the case of a negotiable instrument, if there is an antecedent debt, the antecedent debt may be paid or may be secured by a negotiable instrument, and the negotiable instrument creates an immediate new obligation.

82. CONSIDERATION NEED NOT MOVE FROM THE PROMISEE TO THE PROMISOR.—There is another difference. In simple contracts the consideration must ordinarily move from the

promisee to the promisor. It is something the promisee gives for the promise. That is not necessarily true in negotiable paper. In order to make a promise binding on a negotiable instrument it is essential either that the promisee shall have parted with something or that the promisor, the obligor on the instrument, shall have received something; but it is not essential that both shall concur. The promisee need not have given something to the obligor. Let us give an illustration: A wishes to pay C's claim against B, and A accordingly gives C his (A's) note in satisfaction of C's claim against B. A has bound himself by that instrument though he has received nothing. C has given up something, his claim against B, and that is enough. Also, you may have a case where A, the maker, receives something, as where he at the request of B, to whom he owes money, gives a note for the amount to C instead of to B, who wishes to make C a present of the note. There A has received something, since he has been discharged from the claim that B had against him, but C, who holds that note, has given nothing for it. Yet he can recover on it. To repeat, then, if either the obligor has received something or the holder has given something there is sufficient value or consideration for a negotiable instrument.

83. SECTION 26.—[WHAT CONSTITUTES HOLDER FOR VALUE.] Where value has at any time been given for the instrument, the holder

is deemed a holder for value in respect to all parties who became such prior to that time.

84. CONSIDERATION ONCE EXISTING MAKES OBLIGATION PERMANENT.—A further feature of consideration in negotiable instruments is that if an instrument has once become binding, or if an obligation on an instrument has become binding, because the obligor has received value or a holder has given value, lack of consideration in subsequent transfers is immaterial, so far as concerns the liability of parties to the instrument at the time when value was given or received. To illustrate: A wishes, we will suppose again, to pay a debt B owes to C, A accordingly gives his own note to C, who receives it in payment. Now A has received nothing, but C has surrendered his claim again B, so the note is binding. Suppose, further, C gives that note to D, a pure gift. D now has given nothing for the note and A has received nothing for his promise on it, and yet the note is binding because it was binding in C's hands and D succeeds to C's rights, but if C transferred the note to D by indorsement as a gift, D could not hold C liable as indorser for no value was ever given or received for that indorsement.

85. SECTION 27.—[WHEN LIEN ON INSTRUMENT CONSTITUTES HOLDER FOR VALUE.] Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien.

86. PLEDGE OF AN INSTRUMENT SUBJECT TO A PERSONAL DEFENCE. — If a negotiable instrument which is subject to an equity is pledged as security for a debt, the pledgee, if a holder in due course, is protected to the amount of his advances. The following case will illustrate the law: Suppose the maker is fraudulently induced by the payee to sign a negotiable note for $1,000; the payee transfers this note to secure a note of his own for $500 which he borrows from the transferee. The lender if he took the $1,000 note in good faith can recover $500 on it, but no more. Now suppose the lender subsequently advanced a further sum of $200 on the faith of the $1,000 note. If this further advance was also made in good faith without notice of the fraud, the lender could now recover $700 from the maker of the larger note. If, however, the $200 was advanced after notice of the fraud, the maker could recover only the $500 which was first advanced, as he was then acting in good faith, but could not recover the later advance.

87. SECTION 28.—[EFFECT OF WANT OF CONSIDERATION.] Absence or failure of consideration is matter of defense as against any person not a holder in due course; and partial failure of consideration is a defence pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

88. CONSIDERATION NECESSARY AS TO EVERY PARTY.—Though it is assumed until the

contrary is shown that every party to a negotiable instrument has received value (Section 24) yet the truth may be shown (Section 28) and if in fact there was no value or consideration the obligation cannot be enforced by any one except a holder in due course, and in dealing with the subject of consideration it must be remembered that each party is to be considered separately with reference to that point. There may be consideration so far as a maker of a note is concerned, but none so far as an indorser is concerned; for instance, if a maker borrowed money and subsequently the bank from which the money was borrowed got another person to indorse, the maker would have received consideration and the note would be binding as against him, but it would not be binding as against the indorser. If, however, the indorser received consideration later when he put on his signature he also would be bound; for instance, if the note had become due and the bank said that it might lie awhile unpaid if the maker would get an indorser, and the indorser came in and indorsed in consideration of the bank's forbearing to enforce the note for a time, that would be enough to make the indorser also liable.

89. THE SAME CONSIDERATION MAY SUPPORT SEVERAL PROMISES.—Although there must be consideration for the promise of each party, or he will not be bound, the same consideration may serve for several promises; for instance, if a bank says it will lend money on a note with two

indorsers, and it does lend money on such a note, the money lent is a consideration not only for the maker's obligation but for the obligation of each indorser. The bank demanded the price of several obligations for its one loan, and that one loan was consideration for all.

90. SECTION 29.—[LIABILITY OF ACCOMMODATION PARTY.] An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.

NOTE.—In the Illinois Act the words "without receiving value therefor" are omitted and at the end of the section is added, "and in case a transfer after maturity was intended by the accommodating party notwithstanding such holder acquired title after maturity."

91. ACCOMMODATION SIGNATURES.—Of course lack of consideration is always a defence to an accommodation signature so long as the paper signed has not been transferred to some one who has given value for it. The name "accommodation signer" signifies that he has received no value for his signature, and unless the instrument gets into the hands of some holder who pays something there would be neither value received by the accommodating obligor nor value given by the holder. But as soon as a holder for value comes in, then you

have the necessary element of consideration. It will not then make any difference that the accommodation party received nothing. It is enough that the holder has given something for the instrument; and it does not matter that the holder when he gave the value knew that the instrument was for accommodation. That is not knowledge of fraud or of any impropriety.

Article III—Negotiation

92. SECTION 30.—[WHAT CONSTITUTES NEGOTIATION.] An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery.

93. NEGOTIATION.—Having considered the liability of the various parties to negotiable instruments, we now come to the question of negotiation of the instruments. They may be negotiated either by indorsement or, if payable to bearer, by delivery. In considering this section we must bear in mind that under the definition of section 9, other instruments than those in terms made payable on the face to bearer, are classified under the law as payable to bearer.

94. WHO MAY NEGOTIATE.—When negotiation of a negotiable instrument is by delivery, the delivery may be by anybody. Even a thief or a

finder can make an effective delivery of an instrument payable to bearer, so that a holder in due course will get an indefeasible title. On the other hand, if an instrument is payable to order, the indorsement must be by the person entitled to the instrument; no other indorsement will do.

95. SECTION 31.—[INDORSEMENT; HOW MADE.] The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.

NOTE.—In the Illinois Act the following words are added "and the addition of words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated."

96. EXPLANATION OF SECTION 31.—An acceptance of a bill of exchange is the only obligation on negotiable instruments which is not required by law to be upon the instrument itself. It is really no exception to this rule that if the back of an instrument is covered already with indorsements, a piece of paper called an allonge may be attached to the paper and further endorsements written upon that.

97. SECTION 32.—[INDORSEMENT MUST BE OF ENTIRE INSTRUMENT.] The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the in-

strument has been paid in part, it may be indorsed as to the residue.

98. EXPLANATION OF SECTION 32.—A writing on the back of a negotiable instrument which purported to be an indorsement of part of it would not be wholly ineffectual but it would not negotiate the instrument or itself be negotiable. It would amount to a common law assignment of a portion of the holder's rights under the instrument; and as this assignment would be written on the instrument itself, any holder who took the instrument would have notice of the assignment, and be bound to respect it. The only important limitation, therefore, on the rights of one to whom the holder purports to indorse a part of the instrument is that he would not be given the privileges of a holder in due course. Like any assignee of a chose in action (that is a contract right) he would be subject to all personal defences or equities which prior parties to the instrument might have.

99. SECTION 33.—[KINDS OF INDORSEMENT.] An indorsement may be either special or in blank; and it may also be either restrictive or qualified, or conditional.

100. KINDS OF INDORSERS.—The next person whose liability is to be considered is the indorser. An indorsement must be written on the instrument itself or on a paper attached thereto. A writing on a detached paper cannot be an indorsement. (Section 31.) Normally the payee is the first in-

dorser. The several kinds of indorsement are enumerated in Section 33, with one addition which is defined in Section 64. The statute says an indorsement may be either special or in blank; it may be restrictive, qualified or conditional. The additional kind may be called an anomalous or irregular indorsement. The meaning of a special indorsement as distinguished from an indorsement in blank is, of course, plain. The indorsement in blank in effect makes the instrument payable to bearer. The special indorsement defined in the following section makes necessary the signature of the special indorsee for further negotiation. A blank indorsement may be converted by any holder into a special indorsement by writing over the indorser's signature the name of the indorsee desired. An indorsement is an order. It is sometimes said to be the drawing of a new bill on the drawee or maker; at any rate, it is an order on him. The full form of indorsement is, "Pay to the order of," just the words the drawer of an instrument uses, and the person ordered to pay is the drawee or maker. Though this order does not say so in terms, by mercantile custom it operates as an assignment or transfer of the instrument, and also operates to create an obligation to pay the indorsed instrument, if dishonored by the primary party, on receiving due notice of the dishonor. Ordinarily, words of assignment on the back of a negotiable instrument will not amount to an unqualified indorsement. Nor can an indorse-

ment be partial (Section 32). It must always relate to the entire instrument (Section 32).

101. SECTION 34.—[SPECIAL INDORSEMENT; INDORSEMENT IN BLANK.] A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

102. COMMENT ON SECTION 34.—The definition of a special indorsement is familiar to everyone. The provision that an indorsement in blank is payable to bearer is repeated from Section 9 (5).

103. SECTION 35.—[BLANK INDORSEMENT; HOW CHANGED TO SPECIAL INDORSEMENT.] The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

104. COMMENT ON SECTION 35.—Though an instrument endorsed in blank is payable to bearer, any holder by writing a special endorsement over the signature deprives the instrument of its character; it will then become subject to the rules of order paper.

105. SECTION 36.—[WHEN INDORSEMENT RESTRICTIVE.] An indorsement is restrictive, which either,—

(1) Prohibits the further negotiation of the instrument; or

(2) Constitutes the indorsee the agent of the indorser; or

(3) Vests the title in the indorsee in trust for or to the use of some other person.

But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

106. COMMENT ON SECTION 36.—This enumeration of what constitutes a restrictive indorsement is self-explanatory. The more troublesome matter of the effect of restrictively indorsing is dealt with in the next section.

107. SECTION 37.—[EFFECT OF RESTRICTING INDORSEMENT; RIGHTS OF INDORSEE.] A restrictive indorsement confers upon the indorsee the right,— (1) To receive payment of the instrument; (2) To bring any action thereon that the indorser could bring; (3) To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

NOTE.—In the Illinois Act the following words are added to subsection 2: "or except in the case of a restrictive indorsement specified in section 36—subsection 2—any action against the indorser or any prior party that a special indorsee would be entitled to bring." Subsection 3 reads as follows: "(3) To transfer the instrument, where the form of the indorsement authorizes him to do so" and at the end of the section is added: "specified in section 36—subsection 1—and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsement specified in section 36—subsections 2 and 3 respectively."

108. INDORSEMENT FOR COLLECTION. —The commonest case of a restrictive indorsement is an indorsement for collection. Such an indorsement vests the indorsee with title and a right to bring any action the indorser could bring, and enables the indorsee to transfer his rights to another; but the person to whom the instrument is thus transferred by the restrictive indorsee will also be restricted to the same extent; that is, if an indorsee of paper for collection transfers it to somebody else, that subsequent transferee is also restricted and holds the instrument for collection.

109. SECTION 38. — [QUALIFIED INDORSEMENT.] A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

110. COMMENT ON SECTION 38.—A qualified indorsement is defined in Section 38 of the Act as constituting the indorser a mere assignor. It does not follow that the indorsee is a mere assignee, who takes subject to equities. The final sentence of the section indicates that the indorsee if a holder in due course will take free from equities. The ordinary way of making a qualified indorsement is by adding the words, "without recourse," but the words, "I hereby transfer and assign all my rights, title and interest in and to the within note," have

also been held a qualified indorsement, and in effect an assignment of the instrument, without creating any obligation on the part of the indorser to pay the instrument if dishonored by the party primarily liable.

111. SECTION 39.—[CONDITIONAL INDORSEMENT.] Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

112. ILLUSTRATION OF CONDITIONAL INDORSEMENTS.—A conditional indorsement is not commonly seen. An illustration of one would be an indorsement which reads, "Pay to the order of X Y if A B goes into bankruptcy," or one which is subject to any other condition. It might be thought such an indorsement would be invalid altogether, but the statute provides that the party primarily liable on such an instrument may either disregard the condition or recognize it; but if the condition is disregarded and payment made though the condition has not happened, the person who receives payment will hold it subject to the condition. In the case we put where the instrument was indorsed to X Y if A B becomes bankrupt, the maker of the instrument might pay X Y safely, whether A B becomes bankrupt or not, but X Y would have

to hold that payment in trust for the person from whom he received the instrument, unless A B did in fact become bankrupt.

113. SECTION 40.—[INDORSEMENT OF INSTRUMENT PAYABLE TO BEARER.] Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

NOTE.—The Illinois Act instead of the words "payable to bearer," are the words "originally payable to or indorsed specially to bearer."

114. COMMENT ON SECTION 40.—We have previously considered under Section 9, the effect of this section in connection with Section 9 (5).

115. SECTION 41. — [INDORSEMENT WHERE PAYABLE TO TWO OR MORE PERSONS.] Where an instrument is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.

116. EXPLANATION OF SECTION 41.—Where two or more persons own property, title can only be transferred when all agree to transfer it. The provisions of Section 41 simply apply this to the law of negotiable paper; and the exception to the general rule stated in Section 41 also applies to all property, subject, however, to one qualification. Partners have authority to act for one another and for the firm in the firm business. Therefore, under the doctrines of agency, one partner may indorse

for the firm, and so in other than partnership cases, if one payee has in fact authority to act for the others, he may do so. The single qualification to which allusion has just been made relates to trustees. One trustee can not delegate power to another to do any act which requires the exercise of judgment; therefore though one trustee might authorize another to indorse negotiable paper for collection, he could not transfer by way of sale negotiable paper belonging to the trust, even though authorized by his trustees to do so. The signature of all would be necessary.

117. SECTION 42.—[EFFECT OF INSTRUMENT DRAWN OR INDORSED TO A PERSON AS CASHIER.] Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facia to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

118. ILLUSTRATION.—Suppose A does business as the Boston Hat Company and gets a check or note payable to the Boston Hat Company. Ordinarily and normally he would indorse that in the name of the Boston Hat Company, but if he did not want to do so, he might indorse it in the name of A. The Boston Hat Company is the name under which A does business. It is a business designation of A. If the Boston Hat Company were really a corporation, then the instrument would have to be

indorsed in the name of the corporation, for the corporation would be a different person from A, although A might own all the stock in the corporation; but the mere designation "the Boston Hat Company," if there is no corporation, does not create a separate person. The Boston Hat Company is A, and A may indorse, since he is the real payee and holder.

119. INDORSEMENT UNDER NAME DIFFERING FROM THAT ON INSTRUMENT.—What if an instrument, on its face or by indorsement, is made payable to the order of a single woman by her maiden name and she marries. Her indorsement in her married name is all right. She is the owner and payee, or indorsee, of that instrument and can give a good title in her own name. So if a person changed his name otherwise than by marriage he could indorse in his new name and transfer title to negotiable paper which was payable to or indorsed to him in his old name. He naturally wouldn't do that; he would seek to avoid question by using the name, so far as possible, under which he was designated in the negotiable paper, but he has the legal power to use his real name. Sometimes in order to make his right abundantly clear, he indorses in both names.

120. INDORSEMENT BY ONE HAVING NAME IDENTICAL TO PAYEE'S.—On the other hand, even though a person has an identical name with that of a payee or indorsee of paper, he

cannot transfer good title to it if he is not really the person intended as payee or indorsee. Suppose a check is payable to John Smith, and by mistake it is delivered to the wrong John Smith, and we will even go so far as to suppose that the man to whom it is delivered thinks that it was intended for him; still his indorsement will not give good title even to a holder in due course, nor will it protect a bank which pays on the faith of it. In this respect the law in this country is more severe than the English or German laws. Both the English and German laws protect a bank which pays in good faith an instrument apparently regular in drawing and indorsing, even though the indorsement be made by the wrong person or be forged.

121. IMPERSONATION.—We may suppose one other case of indorsement where the indorser's name is not apparently that on the face of the instrument. Suppose X comes to A and by stating that he (X) is Y (a case of false and fraudulent misrepresentation) induces A to give him (X) a check payable to Y. It is generally held that such a check is really payable to X under the name of Y. A intended to make the person before him the payee, although he thought the name of the person before him was Y and therefore inserted that name. Accordingly, since X is the real payee, he can transfer a title to that instrument by indorsing it either in his own name or in the name of Y, his assumed name. The same principles would be applicable if

an instrument was specially indorsed to X under the name of Y.

122. ASSUMED OR BUSINESS NAMES.—A person may even for a single transaction assume a name different from his own, and if the instrument is really intended to be made payable to him or indorsed to him, he has a title which he can transfer either under his temporarily assumed name or under his real name. If one calls himself John Smith and gets a check in that form, it is really payable to him, and he may transfer title to it by any name that designates him. Section 42 of the Act specifically refers to common cases of this sort of thing; that is, where an instrument is made payable to the cashier or fiscal agent of a corporation. There the statute says that prima facie the instrument is to be treated as payable to the corporation itself, and it may be indorsed either by the officer or by the corporation itself. The statute does not say so, but we presume the same thing would be true the other way around. Suppose a note payable to the bank or fiscal corporation and indorsed in the name of the cashier or fiscal officer, as a check payable to the A bank indorsed "X Y, cashier of the A bank." That indorsement would be good. That is a sort of business designation for purpose of negotiating paper of the A bank. It is equally true that one who signs negotiable paper under a trade or assumed name incurs the same liability as if he signed his own name. (Section 18.)

123. SECTION 43. — [INDORSEMENT WHERE NAME IS MISSPELLED, ET CETERA.] Where the name of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he think fit, his proper signature.

124. EXPLANATION OF SECTION 43.— The provisions of this section are a necessary consequence of the previous provision allowing a man to sign a negotiable instrument in an assumed name. If he may sign in an assumed name, necessarily he may in a misspelled name. The further addition of his name correctly spelled is merely for the purposes of avoiding confusion.

125. SECTION 44.—[INDORSEMENT IN REPRESENTATIVE CAPACITY.] Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

126. HOW AN AGENT SHOULD INDORSE. —As we have seen, the signature of "A, agent," imposes personal liability on A. A problem therefore is presented to an agent when in his principal's business he receives negotiable paper payable to him as agent, and he desires to discount or otherwise negotiate it. If he makes an indorsement as "A, agent," he will subject himself to personal liability. He must, therefore, negative the inference that he means to contract personally. Of course, he can do this by indorsing without recourse, but those with whom he is dealing may demand an indorsement

which will be binding as an obligation. In such a case he should indorse so as to bind his principal but not himself. He may do this by signing his name "on behalf of" his principal, naming the latter or, by signing the principal's name "by" himself as agent. Though an indorsement in the latter form does not follow literally the terms of the face of the instrument, and therefore might not be a desirable one for a bank to accept, it is legally sufficient.

127. SECTION 45.—[TIME OF INDORSEMENT; PRESUMPTION.] Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

128. SECTION 46.—[PLACE OF INDORSEMENT; PRESUMPTION.] Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

129. IMPORTANCE OF PLACE OF INDORSEMENT.—The place of indorsement may be important in deciding whether or not an indorser is liable. For instance, in a recent case a married woman who indorsed for accommodation a note dated and payable in New York, when sued on her indorsement sought to show that the indorsement was in fact made in New York and was invalid under the laws of that State. It was held that this could not be shown against the plaintiff, a holder in due course. As against anybody except a holder

in due course, the evidence would have been admissible.

130. SECTION 47.—[CONTINUATION OF NEGOTIABLE CHARACTER.] An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

131. COMMENT ON SECTION 47.—Under this section a negotiable instrument continues to be negotiable after maturity as well as before, although as appears from other sections of the Act, the rights and obligations of the parties are different after maturity from what they are before.

132. SECTION 48.—[STRIKING OUT INDORSEMENT.] The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

133. ILLUSTRATIONS OF THE FOREGOING RULE.—The commonest application of the rule enacted in this section is where one who has indorsed a negotiable instrument which has thereafter been in other hands and indorsed by others, takes it up and desires to get payment from prior parties to the instrument. If he were obliged to trace his present title fully he would have to prove every indorsement subsequent as well as prior to his own; but as the subsequent indorsements are of no interest to him, since he cannot exact payment from a party to the instrument who is subsequent

to himself, he may strike out the subsequent indorsements and establish a chain of title merely to his first holding of the instrument. By operation of law he is remitted to the same position which he originally occupied. Or we may suppose before the instrument ever came into his hands there were several indorsements upon it, the first of which was a blank indorsement. On taking up the instrument he may write over the blank indorsement a special indorsement to himself, and strike out all later indorsements. In this case, however, he is releasing from liability indorsers whom he might have charged since their names were on the instrument before he became a holder. Therefore he will not adopt the course suggested unless he is sure of being able to get reimbursement from parties to the instrument prior to those whose names are struck out.

134. SECTION 49.—[TRANSFER WITHOUT INDORSEMENT; EFFECT OF.] Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

NOTE.—In the Illinois and Missouri Acts, after the word "right," the first sentence continues as follows: "to enforce the instrument against one who signed for the ac-

commodation of his transferor, and the right to have the indorsement of the transferor, if omitted by accident or mistake. But for the purpose," etc. In the Colorado Act, at the end of the first sentence, there is added, "if omitted by mistake, accident or fraud." In the Wisconsin Act, at the end of the section, there is added: "When the indorsement was omitted by mistake, or there was an agreement to indorse made at the time of the transfer, the indorsement, when made, relates back to the time of the transfer."

135. ILLUSTRATIONS OF CASES OF TRANSFER.—Negotiable paper can only be negotiated in accordance with the custom of merchants; that is, if payable to order it must be properly indorsed; but all contract rights for the payment of money may be assigned and therefore one who transfers order paper without indorsement is the assignor of a chose in action. The transferee is an assignee, and as we have said his rights differ from those of an indorsee only in this that he takes subject to personal defences or equities in favor of the maker and other parties bound by the instrument. It may be added that the same results which this section enacts for the transfer of the paper would follow if the holder of the paper without transferring it merely agreed for value to do so; with this exception, however, the assignee could not demand payment from the parties bound on the instrument until he secured it and was able to surrender or cancel it. He would, however, have the right to demand the instrument from the holder who had agreed to assign it to him. Until he actually got possession of the paper, his right would always be subject to

be cut off by an indorsement by the assignor to a holder in due course. One may suppose also a transfer with delivery but without indorsement and without value. Such a transfer would operate as a valid gift irrevocable by the transferor, but the donee not being a holder in due course would be subject to any defences which were available against his donor.

136. SECTION 50.—[WHEN PRIOR PARTY MAY NEGOTIATE INSTRUMENT.] Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

137. COMMENT ON SECTION 50.—If a party primarily liable becomes a holder of the instrument at or after maturity, it is discharged and can not be reissued. It does not extinguish an instrument, however, for anybody except a party primarily liable to become the holder even though he does so after maturity. The final sentence of the section expresses a result that has been established in order to avoid what is called circuity of action; it is circuity of action where a plaintiff is allowed to recover money from a defendant who can thereafter recover it back from him. If A is the second indorser of an instrument, and after two subsequent indorsements becomes again the holder of the instrument, if he were allowed to sue the fourth or the

third indorser on dishonor of the instrument by the maker, the fourth or third indorser on being compelled to pay, could recover from him as second indorser. To avoid this round-about result, the law denies a recovery by the holder against the third and fourth indorsers in the case supposed.

Article IV—Rights of the Holder

138. SECTION 51.—[RIGHT OF HOLDER TO SUE; PAYMENT.] The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument.

139. HOLDER HAS A RIGHT AGAINST EVERY PARTY.—We may here consider the amount which the holder of a bill or note may recover upon it if it is not paid at maturity. In the first place, the holder has a right against every party to the instrument for the full amount of it, if the parties secondarily liable are once duly charged; that is, on a note for $1,000, the holder, having charged the indorsers, may sue the maker and every one of the indorsers for $1,000 each, and get a judgment against every one of them for that amount. He will then try to collect as best he can. Of course, the holder cannot actually collect on his judgments more than the amount due him and keep it. If he should collect anything in excess of that which is due he will hold the excess in trust for the last party on the instrument.

140. IT IS IMMATERIAL WHAT THE HOLDER PAID FOR A NOTE.—It makes no difference what the holder paid for the note. If he is the owner of it and a holder in due course he may recover the full face of $1,000, even though he bought it for $500, and though originally it was obtained by fraud on the part of the payee, but if the price paid was very small, it is often some evidence in connection with other circumstances that the purchaser did not buy in good faith—that he suspected if he did not know that there was something wrong with the instrument.

141. SECTION 52. — [WHAT CONSTITUTES A HOLDER IN DUE COURSE.] A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

NOTE.—In the Wisconsin Act there is the further subsection: (5) "That he took it in the usual course of business."

142. IMPORTANCE OF BEING A HOLDER IN DUE COURSE.—As we have seen personal defences are not good against a holder in due course (Section 57) and are good against one who is not a holder in due course (Section 58). It is therefore

vital to determine when a holder falls within this designation.

143. THE INSTRUMENT MUST BE COMPLETE AND REGULAR.—The first requisite is that the instrument is complete and regular on its face. That, you see, makes every holder chargeable with what appears on the face of the instrument. If a holder does not in fact draw the inference of irregularity from something on the instrument which really shows irregularity, it is the holder's own fault. He is, in the language that is sometimes used, chargeable with constructive notice of whatever appears on the document itself. Thus it may indicate from its form that a fraud is being perpetrated on a corporation or partnership or the beneficiaries of a trust. Furthermore, the instrument must be complete when negotiated, in order to entitle one to the designation of a holder in due course. That to some extent changes the law from what it was prior to the enactment of the Negotiable Instruments Law. No one who takes a blank check can now be a holder in due course. Of course, if the instrument is given with authority to fill it out in a certain way, one who took the instrument and filled it out in that way would be protected, and one who took the instrument in blank and himself filled it out in accordance with the original authority would be protected (Section 14), but one who took it as a blank instrument, relying on the statement of the payee that it might be filled out for $1,000, when in fact the orig-

inal authority was only to fill it out for $100, would not be able to collect more than $100. He is not a holder in due course, and is bound by the original authority given by the maker. It does not, however, make an instrument incomplete and irregular that it is not dated, states no place of payment or does not state that it is for value received. (Section 6.)

144. KNOWLEDGE THAT BLANKS HAVE BEEN FILLED.—This suggests an inquiry as to the position of one who knows that the instrument was originally issued in blank, but who took it after the blank was filled in. Generally speaking, notice of any defence is enough to prevent one from being a holder in due course, and we should suppose it would be so here, although it seems a pretty harsh result. Suppose a blank check is brought to us and the payee says he has authority to fill it out for $1,000, and he does so and then offers it to us for $1,000. When we take it, it is complete and regular on its face, but we had notice that it was not so when it was issued. We think under the statute it is a somewhat doubtful question whether one who thus took that instrument could be called a holder in due course. We should think it was too doubtful for it to be safe to take it in spite of the provision in section 14 that the person in possession of a negotiable instrument wanting in any material particular, has a prima facie authority to fill up the blanks. One may then ask, what would be the position of a

bank which took an instrument, a check from the payee, knowing that the payee had just filled out the blank? We think the answer must be the same as in the case where the check is purchased. If knowledge of a blank space is a notice of an infirmity in the instrument, it would seem as if the bank ought not to pay under those circumstances. We find it hard to believe, however, that a bank would not be protected that did so.

145. A HOLDER IN DUE COURSE MUST TAKE BEFORE MATURITY AND WITHOUT NOTICE OF PRIOR DISHONOR.—A second requisite stated in Section 52 for a holder in due course is becoming holder before the instrument was overdue and without notice that it had been previously dishonored, if such was the fact. The last clause refers to two cases; first, that of demand paper, which may in fact have been presented and dishonored though the purchaser has no reason to suppose so, and second to the case of a time bill of exchange which has been presented before maturity for acceptance and acceptance refused. That is a dishonored bill, and any one who takes it with knowledge of that fact would not be a holder in due course; but one who takes it in ignorance of the previous dishonor and before maturity would be a holder in due course.

146. GOOD FAITH AND VALUE.—The third requisite of Section 52 is that the holder must have taken in good faith and for value. Those words

need no explanation other than the definition of value, previously given, and a statement in regard to the requirement of good faith. Good faith means, not such care as would be regarded as reasonable business prudence, but simply honest belief in the validity of the instrument, however careless it may have been to have such an honest belief. (Section 56.)

147. NOTICE OF INFIRMITY.—The fourth requisite of Section 52 is, perhaps, almost necessarily included in the one just referred to,—that of good faith. The fourth requisite is that at the time of negotiation, the holder had no notice of any infirmity of the instrument or defect in the title of the person negotiating it. A holder in due course was frequently called, before the passage of the act, a bona fide purchaser for value before maturity, and that really expresses the whole idea, unless, perhaps, the requirement of completeness and regularity on the face of the instrument. Until the contrary is shown, every holder is presumed to be a holder in due course. (Section 59.)

148. PAYEE MAY BE A HOLDER IN DUE COURSE.—The payee may be a holder in due course as well as a subsequent holder. This often becomes important. In a recent case a married woman made out a check payable to a man to whom she owed a debt. She gave this check to her husband with directions to hand it to the creditor in payment of her debt. Now the husband owed this

same creditor a debt on his own account, and he handed that check to the creditor in satisfaction, not of his wife's debt, but of his own. The creditor preferred, when the difficulty was discovered, to treat the check as a payment of the husband's debt, for the wife was responsible, financially, and the husband was not, and the court held the creditor was entitled to do this. Though he was the payee of the check and not the purchaser, he was a holder in due course, having taken it with all the requirements just discussed.

149. POSTDATED INSTRUMENT.—An instrument which is antedated or postdated is not on that account irregular on its face, and one may be a holder in due course of such an instrument. (Section 12.)

150. SECTION 53.—[WHEN PERSON NOT DEEMED HOLDER IN DUE COURSE.] Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

151. WHAT IS A REASONABLE TIME FOR A CHECK OR NOTE.—A check must be presented within a reasonable time after its issuance. What is a reasonable time depends on the time necessary to collect, and undoubtedly the customary mode of collection would be regarded as reasonable, even though that was not the quickest. The customary mode is not always the shortest method. In regard to notes, the rule is the same as in re-

gard to checks,—a reasonable time from the issue of the note, only what is a reasonable time for a check is not necessarily a reasonable time for a note.

152. SECTION 54.—[NOTICE BEFORE FULL AMOUNT PAID.] Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

153. RIGHTS OF ONE WHO HOLDS A NOTE FOR COLLATERAL.—Contrast with the case of a purchaser, a case where the holder at maturity holds the note merely for security. In that case if the parties liable on the note—the maker and indorsers, or any of them—have a defence good against the person who deposited the note as collateral, the holder for collateral can only collect the amount for which he holds the note pledged; that is, if a note for $1,000 was deposited to secure a claim of $500, the holder could collect only that sum, because that satisfies his claim, if as we are supposing, the man who deposited it as collateral was not a holder in due course and could not himself have collected anything from the parties liable on the instrument. If the man who deposited the note as collateral, however, was a holder in due course, then the lender who holds the note as collateral will collect it in full and will pay over to the man who de-

posited the note the excess over and above the indebtedness.

154. SECTION 55.—[WHEN TITLE DEFECTIVE.] The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

NOTE.—In the Wisconsin Act there is added at the end of the section: "And the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

155. ABSOLUTE AND PERSONAL DEFENCES.—Under this section we will consider the absolute and the personal defences to obligations on negotiable instruments. We have already considered certain cases of lack of genuineness of a signature owing to forgery or lack of authority.

FRAUD AS AN ABSOLUTE DEFENCE.—Still another case of lack of genuineness may arise in certain cases of fraud. Generally fraud is only a personal or equitable defence, but in certain instances it may be an absolute or real defence. Such a case is where the maker of the instrument did not know and had no reasonable cause to know that he was making a negotiable instrument at all. If a man knows he is making such an instrument, even though he is induced to make it by fraud, it is his

instrument and he is bound by it. But suppose by clever sleight of hand a fraudulent person gets another to sign a note who is under the belief that it is a receipt or letter of introduction or something of that sort which he is signing. Here you will notice that the signer has never assented to make a negotiable instrument. It is not a case where he is induced to assent by false representations. There he assents to do the thing but here he never assented to sign a negotiable instrument at all; and therefore he may assert that it is not his note, unless he was guilty of such negligence as precludes him from subsequently asserting the truth that it was not his instrument.

156. LACK OF TITLE.—A second absolute defence is lack of title in the holder of an order instrument. Lack of title in an instrument, payable to bearer, as we have said, does not prevent the holder from giving a good title, but lack of title in an instrument payable to order does. Even though it be conceded that the maker of a note or drawer of a check be liable, he has a right to pay the real owner of the instrument. If he should pay any one who did not have title, the payment would not be a discharge of the instrument, and he would have to pay over again. Therefore he has a defence against anybody who has not title. Consequently, a holder, to recover on an order instrument, must make out not only the defendant's liability on the instrument to some one, but also his own title to it.

157. A HOLDER'S BANKRUPTCY DEPRIVES HIM OF TITLE.—Another case of lack of title is where the holder of negotiable paper has become bankrupt. The National Bankruptcy Law vests in the trustee all property which the bankrupt had at the time of his bankruptcy. We suppose that statute vests an absolute title even to negotiable paper, so that one who innocently bought negotiable order paper from a bankrupt to whom it was payable after his bankruptcy would not be protected. The trustee in bankruptcy would have become the owner of it and the bankrupt himself would have no better right to it than if he held under a forged indorsement. If, however, the instrument was payable to bearer, under the general rule applicable to such paper, the bankrupt holder, though having no title himself, could transfer a good title to a holder in due course.

158. INCAPACITY. — INFANCY. — Another absolute defence to a negotiable instrument good against any holder is the incapacity of a party. The instrument may be binding as to some parties, but on account of incapacity others may not be liable. The commonest kind of incapacity is infancy, that is, minority of a party. It is a good defence even against a holder in due course that the party sued is a minor. It is not a good defence that a prior holder was a minor when he indorsed the instrument. Though the minor may avoid that transfer as against the transferee, until and unless he does so,

it is a good transfer, and the maker will be bound to pay the transferee. (Section 22.)

159. LUNACY.—Somewhat similar to infancy is the case of lunacy. It is possible that in some cases of lunacy the transaction may be absolutely void and incapable of ratification; but whether this is so or not, lunacy is generally held a good ground for treating the obligation of an insane person on the instrument as voidable, even when it is in the hands of a holder in due course.

160. HUSBAND AND WIFE.—Formerly a married woman could make no valid contract by negotiable instrument or otherwise. This complete disability is now generally done away with, but it is still true, in most States, that a husband and wife cannot make a valid contract with one another, and therefore neither of them can make a valid obligation from one to the other on a negotiable instrument. A note by a husband to wife or wife to husband is, therefore, worthless, even in the hands of a holder in due course. Similarly, an indorsement from one to the other will not be a valid transfer and will create no obligation. A check from one to the other deserves a moment's attention. Such a check does not create any obligation between the drawer and payee, but it is a valid order to the bank by the drawer to pay the payee. Accordingly, if the bank does so, the payment is good. In some States married women are under the further disability that they cannot become sureties for their husbands. In

such States, therefore, there would be an absolute defence to any suit against a married woman based on an obligation which she signed as surety for her husband.

161. ILLEGALITY.—A fifth absolute defence is raised by certain kinds of illegality. Some transactions are so illegal that even in the hands of a holder in due course a negotiable instrument given in pursuance of them will not be valid. Under the statutes of some States, usury is a defence of that sort. In other States, there is no general usury law.

162. SUNDAY LAWS.—The Sunday law of many States is rather troublesome at times. One must remember in connection with this matter that it is the delivery of a negotiable instrument, not the date which it bears on its face, which fixes the time when it takes effect. Accordingly, a note dated on Sunday but delivered on Monday is good. On the other hand, a note dated on Saturday or Monday but actually delivered on Sunday is bad, though a subsequent holder, who took such a note in ignorance of the day when it was delivered, might rely on the form of the instrument—that is, on the fact that it was dated on Saturday or Monday—and be protected. The maker would be estopped to deny that it was delivered on Saturday or Monday since the date may properly be assumed to be the true date. (Section 11.) A note, however, which was dated on Sunday, and which was delivered as a matter of fact also on Sunday, would seem to be bad in the hands

of any holder, for any holder has notice by the date of the time of probable delivery, and therefore ought to be on the lookout for that.

163. ILLEGALITY AS A PERSONAL DEFENCE.—One who is not a holder in due course is subject not only to the absolute defences already considered, but also to what are called personal or equitable defences, and these may now be considered. Some, but not all of them, are briefly summarized in Section 55. First, illegality. As we have previously said earlier, illegality may sometimes be an absolute defence good against everybody, but it is more commonly a personal defence good only against the original party to the illegality and those subsequent holders who are not holders in due course. Some of the commonest kinds of illegality are wagering, including under this designation such stock gambling or gambling in securities, as is prohibited by law. Usury is, in most States, where there are usury laws, a personal defence. The sale of goods contrary to law may give rise to a personal defence to a note given for the price. Instruments given as bribes to any person subject to a public or private duty to induce him to disregard that duty would also be another illustration. It would make no difference whether the official bribed were a public officer, a corporation official, a trustee, an employee of a firm, or an individual. So any transaction which involves a breach of fiduciary duty or official duty, whatever its nature, would be illegal,

and a negotiable instrument which formed part of the transaction would be subject to a personal defence.

164. FRAUD.—A second personal defence, and perhaps the commonest, is fraud. As already stated, fraud may be an absolute defence. If the fraud prevented a party to the instrument from knowing that he was signing a negotiable instrument, he would have an absolute defence, unless he was grossly negligent. On the other hand, if he knew that he was signing a negotiable instrument, but was induced to do so by false representations, the defence would be merely personal. Suppose a note was a perfectly good note as between the maker and payee, but was obtained from the payee by fraud, the indorsement of the payee being obtained by fraudulent representation. Payment is then demanded by the fraudulent indorsee. The instrument would be technically discharged by such a payment; but if the maker knows of the fraud he would make himself a party to it if he should pay the fraudulent indorsee, and would be liable to pay again to the defrauded payee. This sort of case may put a bank in rather a hard place. Suppose a check drawn on a bank is presented by an indorsee and the bank believes and is informed by the payee that that check was obtained by fraud. If in fact it was obtained by fraud and the bank refused to pay, its defence would be good against any assertion or complaint by the drawer of the check that his check had been dishonored; but

suppose there was, as it turned out, no fraud, then if the bank had refused payment of the check, even temporarily, it would run a risk of subjecting itself to a suit for damage by its customer, the drawer. Nevertheless, there is nothing that can be done except to refuse temporarily and file a bill for interpleader against the payee and the indorsee, asking the court to determine which of the two parties is entitled to the instrument.

165. DURESS.—A defence somewhat similar to fraud is what is known in law as duress. This was at first confined by law to cases where a person was compelled to sign an instrument under imminent fear of bodily harm or imprisonment, but the defence has now been extended beyond that. There are many kinds of duress which do not threaten the person under duress himself with immediate harm. For instance, a case arose in New Jersey which presented these facts: a husband threatened to blow his brains out if his wife did not sign an instrument, and brandished a pistol so that his threat seemed at least plausible, and thereby induced his wife to sign a paper. She would have a personal defence against an obligation entered into in that way. So a threat to injure a child or to injure another person may have even more effect than a threat to injure the person himself whose signature is demanded. The test today is, was such pressure put upon the signer as to prevent him from being really a free agent in the matter? It is not duress, however, to threaten

to enforce one's legal rights unless an instrument is signed. For instance, a threat by a creditor to sue, or a threat to attach the debtor's property unless the debtor signed a note, would not be such duress as to create even a personal defence.

166. LACK OF DELIVERY.—Lack of delivery is a personal defence. Until the passage of the Negotiable Instruments Law it was an absolute defence, but now, by virtue of Section 16, it is only a personal defence. Suppose you make a note payable to bearer and put it in your safe, intending to deliver it the next day. It is stolen and transferred before maturity to a purchaser for value without notice. He can hold you liable upon it, although you never delivered the instrument, and perhaps wrote it as a mere writing exercise. And similarly (a case that is more likely to happen) if you have a note payable to yourself, indorse it without delivering it, put it in your safe, and, as before, it is stolen. A purchaser for value from the thief not only becomes the owner of the note, able to enforce it against the maker, but he can hold you liable on your indorsement as an indorser. Lack of delivery is therefore not an absolute defence. It is, however, a personal defence good against the original payee and any one with notice that the instrument was not delivered or was delivered only for a special purpose which has not happened. For instance, if you deliver a note to a note broker to dispose of, and he does not dispose of it in accordance with the authority you gave him,

you have a personal defence against him if he tries to collect it, or against any one who knew of the circumstances, because of the original understanding that the instrument should be delivered as a binding obligation only on certain terms.

167. LACK OF CONSIDERATION.—Another personal defence is lack of consideration. We have already referred to that subject in text paragraphs 17 to 22 in connection with the liabilities of different parties on negotiable instruments, and it is not necessary to repeat what has been said before. It is enough to say here that if there is not the consideration or value which the law requires for the obligation of any party to an instrument, he has a defence as against anybody but a holder in due course because of this lack of consideration or value. The commonest kind of signature without consideration is that of an accommodation party. An accommodation party, therefore, even though the maker of the instrument, cannot be sued by the holder if the holder was the accommodated party. There is one peculiarity, however, about the defence of accommodation which distinguishes it from all other personal defences. An accommodation party has no defence merely because the holder took the instrument from the accommodated party with knowledge that it was given for accommodation. (Section 29.) Generally, as we have seen, one who takes with a notice of a personal defence from one who was subject to that defence, becomes himself

subject to the defence in the same way as the man from whom he took it. One who takes from a fraudulent payee knowing of the fraud can no more collect than the fraudulent payee, but one who takes from an accommodated payee knowing of the accommodation can, if he gives value, collect from the accommodation maker. And the reason for this distinction is plain: the accommodating party lent his signature for the very purpose of having it negotiated, and therefore it would be highly improper not to allow one who has relied on the signature to recover upon it, even though he knew perfectly well that it was for accommodation. In buying the instrument or lending money on it, he is doing exactly what the accommodating party expected him to do.

168. FAILURE OF CONSIDERATION.—A defence somewhat similar to lack of consideration and yet a different one is what is called failure of consideration. This arises where an instrument is given for some prospective or promised return which is not given. For instance, suppose a note is given in return for a promise to deliver goods later. There is no lack of consideration, strictly speaking, for this note, because there was a promise to deliver the goods, and a promise is sufficient consideration for the note. But if the goods are not delivered when the time comes there is failure of consideration; the thing expected was not given; the promise has not been kept. And thus where there is failure

of consideration the person who was to give the consideration cannot recover because he has failed to give it, and any holder who took the note, knowing that the consideration had failed, will similarly be unable to recover. Perhaps as common an illustration of this defence as any arises where a note is given for the price of a chattel which is warranted and there is a breach of the warranty. In many States, that entitles the buyer of the chattel to rescind the contract, to give back what he has bought, and to demand his discharge from the obligation of the note. Accordingly, if he tenders back the inferior chattel he has a defence against any action on the note brought either by the payee, who sold the chattel and warranted it, or by anybody taking from that payee who is not a holder in due course.

169. DISCHARGE BEFORE MATURITY.— Still another personal defence is discharge of an instrument before maturity in any way except by the cancellation of it. We have already seen in paragraph 66 that cancellation of a negotiable instrument, even before maturity, is an absolute discharge of it. Any kind of discharge by payment, release, or accord and satisfaction is a good defence after maturity, because after maturity there can no longer be a holder in due course. Every one who takes after maturity will take subject to that defence of payment or release or accord and satisfaction. But payment, or release, or accord and satis-

faction of a negotiable instrument before maturity is only a personal defence. You may have a holder in due course after the payment or release, and this holder in due course can sue again on the instrument and recover in spite of the fact that the maker has already paid once. The moral, of course, is plain, that if an attempt is made to settle a negotiable instrument before it is due, it must be accompanied by a cancellation of the instrument; that is, some physical mutilation or destruction of the paper sufficient to show that it is no longer a valid obligation.

170. ALTERATION.—Another personal defence is alteration, of which we have already spoken in connection with absolute or real defences. The maker of an altered note has an absolute defence against the note in its altered form, but has a personal defence only against it in its original form, that is, a holder in due course can enforce the note according to its original tenor. Nobody can enforce it according to its altered tenor.

171. SET-OFF AS A PERSONAL DEFENCE. —Another personal defence may arise from a right of set-off. Suppose the maker of a note has on another account a claim against the payee which the maker of the note could set off against the claim of the payee if the payee should sue on the note. Now suppose the payee indorses the note. Can the maker use this right of set-off against the indorsee who has purchased the note, or must the maker pay the

note in full to the holder and then try to collect his own claim from the original payee? It is held generally in this country, to depend upon whether the indorsee was a holder in due course. If he is, he takes free of the right of set-off. If, however, he did not give value, or if he knew of the claim in set-off, or purchased after maturity, generally in this country the maker of the note may assert his right of set-off against the indorsee. In England he cannot do that. It is said there, that the right of set-off is not really an equity relating to the note, and that it is a separate claim good only against the original payee, which should not travel with the note and should not under any circumstances be good against anybody but the payee of the note.

172. PAROL EVIDENCE RULE.—This concludes the list of personal defences with the exception of one thing, which partakes somewhat of the nature of a personal defence, although it is a more extensive matter than a mere personal defence. This is what is called the Parol Evidence Rule. The Parol Evidence Rule in substance is this: when any party enters into a written contract the terms of the contract must be determined wholly from the writing. This rule does not apply simply to bills and notes, it applies to any written contract, and it forbids parties to written contracts attempting to prove that the writing is not really what they agreed, or that they agreed to something more or something less than the writing. Nothing is commoner than

for parties to attempt that sort of wriggling out of a written contract. The party to the writing who finds his feet pinched by some of its provisions frequently in good faith thinks it was not what the parties originally meant. The Parol Evidence Rule requires the court to enforce the writing, and not what the parties testify they meant or would have written if they had thought about it, or anything of that sort. Not infrequently the Parol Evidence Rule works a certain injustice, because it may be true that the writing did not contain all that the parties agreed, or contains something a little different from what they bargained for. But the defence of the rule is that it makes more certain the real agreement between the parties in so many more cases than those where it works injustice, that on the whole it works well.

173. ILLUSTRATIONS OF INADMISSIBLE PAROL EVIDENCE.—Now how does the Parol Evidence Rule hit negotiable instruments? Not infrequently a party to an instrument will attempt to set up some agreement which he asserts he made in regard to the note. A common agreement of this sort is an agreement that the note need not be paid at maturity but may be extended. That sort of agreement if made contemporaneously with the note cannot be proved. The note by its terms says it is payable on such a day. It would contradict the terms of that writing to set up and prove an agreement that it was not to be paid then, but that it was

to be paid at some later day. So if a note is positive in terms it would not be permissible to show that it was agreed between the parties that the note should be paid only upon a certain contingency. That sort of agreement is frequently made, but it is invalid unless made part of the writing.

174. SUBSEQUENT ORAL AGREEMENTS ARE VALID.—We must call attention, however, to this fact, that the Parol Evidence Rule relates only to agreements made at or before the time when the writing was executed. One may make a subsequent oral agreement which, if it has sufficient consideration, will not infringe upon the Parol Evidence Rule and will be binding. The reason of this distinction between subsequent agreements and agreements made at or before the time of the writing is this: the theory of the Parol Evidence Rule is that when parties reduce their agreement to writing, prima facie they include in that writing everything relating to that matter. But the next day or the next week they may change their minds, and they have a right to make a new agreement. There is nothing in the fact that they made a writing yesterday which would lead any one to suppose that that writing was going to be good permanently; but it is fair to suppose that at the time they made it, it expressed their whole intention in regard to the matter. Consequently, these contemporaneous agreements which we have suggested, relating to the same subject-matter as the note and inconsist-

ent with its terms, cannot be shown, but let us put some cases of matters which may seem to come pretty close to the Parol Evidence Rule and which nevertheless, may be shown.

175. ILLUSTRATIONS OF WHAT MAY BE PROVED.—It may be shown that indorsers are not liable in the order in which their names appear on the paper. It is not regarded as a contradiction of the instrument to show that the first indorser really wrote his name low down on the back of the paper and the second indorser wrote his higher up. Neither is it an infringement of the Parol Evidence Rule to show that one of the signers signed for the accommodation of another; that does not affect the liability of the accommodating party to the holder of the note. If he is a maker he is liable as a maker, even though he makes the instrument for accommodation. The fact that the instrument was never delivered as a negotiable instrument may be shown. It may be shown that the date which the instrument bears on its face, though such a date is prima facie proof of the date when the instrument was delivered, was not really the date of delivery. It may be shown that the instrument when delivered was either antedated or postdated. If the language is ambiguous also the law allows evidence of the surrounding circumstances and other matters tending to show what the ambiguous words really meant. In any kind of contract the Parol Evidence Rule does not prevent a party from showing that

the instrument took its present form because of fraud or duress, and certain cases of gross mistake also may be shown, and the enforcement of the contract relieved against. It has sometimes been thought inconsistent with the principle of the Parol Evidence Rule that an acceptance of a bill of exchange should not be required to be written on the face of the instrument. It is the custom of merchants, of course, when a bill is accepted to write it on the bill, but an acceptance may legally not only be written in that way but may also be written on a paper other than the bill itself. That is so provided in section 151. But such an acceptance only binds the acceptor in favor of a person to whom it is shown and who on the faith thereof receives the bill for value. Furthermore, even before a bill is drawn an unconditional promise in writing to accept the bill is deemed an acceptance in favor of any one who on the faith of the writing receives the bill for value.

176. RELATION OF PAROL EVIDENCE RULE TO PERSONAL DEFENCES.—Now how does the Parol Evidence Rule have anything to do with personal defences and holders in due course? Only in this way: that a purchaser who is a holder in due course unquestionably will have a right to rely on the terms of the instrument as they appear in the writing. Whether a collateral agreement does or does not infringe upon the Parol Evidence Rule, it is important to determine whether it may

be shown as between the original parties to the instrument; but in either case it cannot be shown as against a holder in due course if the terms of the instrument do not indicate the defence.

177. SECTION 56.—[WHAT CONSTITUTES NOTICE OF DEFECT.] To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

178. COMMENT ON SECTION 56.—There was formerly considerable litigation upon the question whether one who took an instrument for value and in good faith, but negligently, was a holder in due course. In other words—is it the equivalent of actual notice of a defence to prove that if the holder had not been negligent he would have learned of the defence in question? The statute establishes that negligence is not the equivalent of notice. Knowledge of such facts is necessary, as would indicate actual bad faith.

179. SECTION 57.—[RIGHTS OF HOLDER IN DUE COURSE.] A holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

NOTE.—In the Illinois Act defenses of fraud, circumvention and gaming within the meaning of certain local statutes

are excepted and remain as before the passage of the Act, absolute defenses. In the Wisconsin statute also some exception are made to the enactment of freedom from defenses.

180. COMMENT ON SECTION 57.—It might not be easy to say what this section meant by "defect of title" or "defences available to prior parties among themselves," if we did not have the well settled law existing prior to the adoption of the statute to aid in construing it. With this aid it is clear that what is meant is that the holder in due course takes free of personal defences or equities though he does not take free of absolute defences. We have already considered what defences fall under each heading.

181. SECTION 58.—[WHEN SUBJECT TO ORIGINAL DEFENCES.] In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defences as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.

182. COMMENT ON SECTION 58.—One who is not a holder in due course is (1) a person who has not given value; that is, a donee; and (2) a person who has notice of a defence. We have seen that a holder may give partial value and will, therefore, become a holder, in due course, to the extent of the value of which he has given. It is also conceivable that a holder may take with notice of a defect amounting to only a partial defence to the instru-

ment. The last sentence in Section 58 imposes an important qualification on the rule that notice of a defect subjects one who takes the instrument to a defence. After an instrument has once come into the hands of a holder in due course, all personal defences or equities in favor of prior parties are thereupon cut off. As the holder in due course might enforce the instrument in spite of such equities, he may give his own rights to whomsoever he will. He will not lose his rights if he finds out the defence subsequent to his acquisition of the instrument, and if he seeks to sell the instrument to another he may tell the purchaser the facts and the purchaser may safely buy. Although he will know there was an equity, he will also know that the equity has been cut off. This does not injure the party who had a personal defence. It is no more burdensome to him to pay a subsequent purchaser than it would be to pay the first holder in due course. Therefore, when any personal defence is raised, the question is not simply whether the present holder is a holder in due course but whether at any time subsequent to the delivery of the obligation, enforcement of which is sought, the instrument has come into the hands of such a holder.

183. SECTION 59.—[WHO DEEMED HOLDER IN DUE COURSE.] Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the

burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

184. COMMENT ON SECTION 59.—This section relates merely to the burden of proof. Prima facie the holder of an instrument is a rightful holder, and a holder for value. When, however, it has been shown that an equity existed, the burden is then on the holder to establish that this equity has been cut off by the acquisition of the instrument at some time by a holder in due course.

Article V—Liabilities of Parties

185. SECTION 60.—[LIABILITY OF MAKER.] The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to endorse.

186. LIABILITY OF A DRAWEE, ACCEPTOR AND MAKER.—The drawee until he accepts a bill is not liable on the instrument, but he may be liable by virtue of a collateral contract with the drawer. For instance, if a bank fails to honor a check drawn upon it when the drawer has funds, the bank will be liable not on the check and not to the holder of the check, but to the drawer of the check on his implied contract with the bank when he became a depositor that the bank would honor

such checks as he should draw within the limits of his account. The acceptor when he accepts becomes the party primarily liable on the instrument, and of course the maker of a note is similarly liable. (Section 60.) The normal and only proper way of accepting a bill is in writing on the bill signed by the drawee, but the statute holds a written promise by the drawee though not on the bill binding upon one to whom it is shown and who on the faith of it receives the bill for value. (Sections 134, 135.) The statute (Sections 139-142) distinguishes general acceptance from qualified acceptance. A holder is entitled to a general, that is, an unqualified acceptance, and if the drawee refuses to give it, may treat the bill as dishonored (Sections 142-149), but the holder may, if he chooses, take an acceptance varying from the tenor of the bill in amount, place, time or otherwise. If he does so the acceptor will be liable according to the terms of his acceptance—not according to the terms of the bill as originally drawn. The drawer and indorsers will be discharged since they never agreed to be responsible for such a qualified acceptance; but they can assent to be so responsible, and if after notice of the qualified acceptance they do not express dissent to the holder, they will be deemed to have assented. (Section 142.)

187. SECTION 61. — [LIABILITY OF DRAWER.] The drawer by drawing the instrument admits the existence of the payee and his then

capacity to endorse; and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negativing or limiting his own liability to the holder.

188. LIABILITY OF A DRAWER. — The drawer of a bill orders the drawee to pay. He does not in words say, "And I promise to pay if the drawee does not," but he impliedly promises that by drawing the bill, and he may not only promise to pay the instrument if the drawee fails to pay it, but also if the drawee fails to accept it. A demand bill does not contemplate an acceptance, but a time bill (and in Massachusetts, New Hampshire and North Carolina a sight bill) does, and a drawer of such a bill promises in effect, "If this instrument is presented for acceptance it will be accepted, or if not, on due notice I promise to pay it; and, further, if it is not dishonored for nonacceptance and is presented for payment at the day of maturity, I promise that if it is not then paid, on due notice of that fact I will pay it." The holder of such a bill need not present it for acceptance unless he likes. He may wait until the day of maturity and then simply present it for payment; but if he presents it for acceptance and the instrument is not accepted, he must then give notice of dishonor, to the drawer, for

the drawer's obligation is conditional, not simply on the failure of the drawee to accept and to pay, but also on proper notice of such failure being sent to the drawer. The holder, after failing to give notice of dishonor for nonacceptance, cannot thereafter charge the drawer by presentment at maturity for payment, and giving notice of nonpayment. The drawer may expressly put other conditions limiting his obligation to pay the instrument, but that is not common.

189. SECTION 62.—[LIABILITY OF ACCEPTOR.] The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits,—(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) The existence of the payee and his then capacity to endorse.

190. ADMISSIONS IMPLIED BY DRAWING, MAKING OR ACCEPTING.—The drawer, the maker and the acceptor, by signing, admit the existence of the payee and his capacity to indorse the instrument. If he becomes incapacitated to indorse after the instrument is drawn, however, that may be set up as a defence. The acceptor further admits not only the existence of the drawer but the genuineness of his signature and his capacity and authority to draw the instrument. That is a matter that has given rise to a good deal of litigation. The result of the cases prior to the Negotiable Instruments Law was generally the same as is now

stated in the statute. The reason for the result as generally given is that the drawee is bound to know the signature of the drawer. Accordingly, if a holder for value presents a check or presents a bill of exchange to the drawee, and the drawee pays it, the money cannot be recovered, although the signature is forged. The drawee must look out for that before he pays, and an acceptor similarly must be on his guard when he accepts the instrument. So a bank when it certifies a check becomes absolutely liable to pay it to a holder in due course, even though the drawer's signature was forged. (Sections 23, 60-62.)

191. SECTION 63. — [WHEN PERSON DEEMED INDORSER.] A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

192. COMMENT ON SECTION 63.—There have been many cases in the past raising the question of the liability intended to be assumed by one who placed his name on negotiable paper in an unusual way. Most of these cases it is true related to what are called irregular indorsements in the following section of the statute. But it is possible for one to become a party to an instrument as a guarantor. So one who signs on the back of negotiable paper may intend to assume the liability of a maker

rather than an indorser. It is possible under the Negotiable Instruments Law to give effect to any such intentions if they are clearly manifested, but this section of the statute provides a rule of presumption applicable where it is not made perfectly clear that another meaning is intended.

193. SECTION 64.—[LIABILITY OF IRREGULAR INDORSER.] Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:—(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties. (2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer. (3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

NOTE.—In the Illinois Act sub-section (1) and (2) are as follows: (1) If the instrument is a note or bill payable to the order of a third person, or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties. (2) If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

194. ANOMALOUS OR IRREGULAR INDORSEMENTS.—Ordinarily an indorsement is both a transfer and a special kind of guarantee, but it may be one only of these things or it may be neither. Thus, an indorsement without recourse is a transfer but is not a guarantee. An anomalous indorsement is not a transfer but it is a guaranty. So

an indorsement of an instrument negotiable by delivery, though unnecessary to transfer the instrument, is effective to create the liabilities of an indorser. (Section 67.) And there is one kind of indorsement that is neither a transfer nor a guarantee, but merely a receipt. Suppose a check is presented by the payee at the bank on which it is drawn. The bank asks for the payee's indorsement. Now that signature will not enable the bank under these circumstances to sue the indorser, even though the drawer had in fact no funds or even though the drawer's signature was forged; it is simply an acknowledgment or receipt for the money. But the anomalous or irregular indorsement though not a transfer is a guaranty of the same sort that an unqualified regular indorsement is. It is called anomalous or irregular because it is made by one who is not a party to the instrument nor a holder of it. A makes a note payable to bank B and gets C to sign at the time of the transaction as an indorser for security. C was never, of course, a holder of that instrument, and consequently the indorsement is not a transfer. The same practical result might be reached and often is reached by a regular indorsement. A might have made that note payable to C and then got C to indorse it to the bank. Under the transaction in that form the bank would as before have the signatures of A and C, but here C would be a regular indorser, as he was the payee of the instrument. Before the passage of the Negotiable

Instruments Law an anomalous indorser was held in some States a joint maker of the instrument, in others varying kinds of obligations were held to be created by such an indorsement. This led to all kinds of trouble; but that is changed by the Negotiable Instruments Law, which provides in Section 63 that where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as an indorser to parties who take the instrument subsequently; and he is entitled to the same diligence on the part of the holder in order to charge him as is required in order to charge a regular indorser. It is broadly provided also in Section 64 that if a person places his signature on an instrument otherwise than as drawer or acceptor he is bound as an indorser, unless he clearly indicates by appropriate words another intention.

195. SECTION 65.—[WARRANTY WHERE NEGOTIATION BY DELIVERY, ET CETERA.] Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:—(1) That the instrument is genuine and in all respects what it purports to be; (2) That he has a good title to it; (3) That all prior parties had capacity to contract; (4) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporation securities, other than bills and notes.

196. WARRANTIES.—The law of warranty in regard to negotiable instruments is based on the same principle as the law of warranty in the sale of chattel property. If a seller induces a buyer to purchase by making a representation of the title or the quality of the goods sold, he becomes a warrantor of the truth of his statements. Had he merely expressed an opinion instead of making a positive affirmation he would not have been so liable. The law also recognizes that even though no express affirmation is made, the very act of offering goods for sale carries with it an implied representation. One who purports to sell goods impliedly represents that he is the owner, and, therefore, impliedly warrants his title. So we find it recognized in the law of negotiable paper that one who sells it impliedly warrants his title and warrants that the instrument is what it seems to be; namely, a genuine instrument; and that the parties who purport to have signed have actually signed and have the capacity to sign. There is no warranty, however, implied of the solvency of the parties, nor is there a warranty that none of the parties has a defence to the instrument unknown to the seller.

197. SECTION 66.—[LIABILITY OF GENERAL INDORSER.] Every indorser who indorses without qualification, warrants to all subsequent

holders in due course: (1) The matters and things mentioned in subdivision one, two and three of the next preceding section; and (2) That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

198. LIABILITIES OF AN INDORSER.—An indorser's main obligation is, of course, an undertaking that on presentment a bill shall be accepted or shall be paid at maturity, or both, and similarly he engages that a promissory note shall be paid at maturity on presentment, subject in both cases to proper notice being given of dishonor. He also makes certain warranties in regard to the instrument itself, and even one who indorses without recourse, or who transfers by mere delivery paper payable to bearer, makes certain warranties, the most important of which is that the instrument is genuine and is what it purports to be. Accordingly, if there is any forged signature on negotiable paper, one who indorses without recourse would be liable to the purchaser for such damage as the forgery caused. One who sold such an instrument without any indorsement would also be liable to the same extent. Furthermore, it is warranted by the trans-

ferrer, whether an indorser or not, that he has title to the instrument, and that all the prior parties had capacity to contract. If the instrument is simply transferred without indorsement, the seller also warrants that he has no knowledge of any fact which would impair the validity of the instrument and render it valueless. The provision as to capacity to contract does not apply to the sale of bonds of corporations or public securities, but the provision as to genuineness would apply to any negotiable instrument which is sold. (Section 65.) Indeed, the law is the same on this point when any personal property is sold.

199. SECTION 67.—[LIABILITY OF INDORSER WHERE PAPER NEGOTIABLE BY DELIVERY.] Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

200. SECTION 68.—[ORDER IN WHICH INDORSERS ARE LIABLE.] As respects one another indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally.

201. ILLUSTRATIONS OF THE PROVISIONS OF SECTION 68.—Indorsers, as between themselves, are bound in a fixed order. That is generally the order in which the names appear on the paper, but conceivably it might not be. Thus, a

second indorser might place his name above a prior indorsement, but that would not render him a prior indorser. So, also, several indorsers might be jointly liable. They may all have indorsed as co-sureties. In that case, as between one another, they would have to share the loss equally; but generally as between themselves indorsers are liable in the order in which their names appear. The last indorser can sue the preceding one and so on (Section 121), but so far as the holder is concerned this order makes no difference. He can charge all the indorsers at once on dishonor of the instrument, and he can bring an action or actions against all of them at the same time. (Section 84.) He may sue any one or all of them before he sues the party primarily liable, or he may sue the indorsers at the same time that he sues the party primarily liable; and the holder may get judgment against all of these parties for the full amount of the bill or note, the only limit to his rights being that he can collect on his judgments only the full amount of the instrument.

202. SECTION 69.—[LIABILITY OF AN AGENT OR BROKER.] Where a broker or other agent negotiates an instrument without endorsement he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

203. COMMENT ON SECTION 69.—Though the law of undisclosed principal does not apply to obligations on negotiable paper (the rule as to them

being that only the party named on the paper as contracting is bound whether he be in fact principal or agent) the obligations named in Section 65 are extrinsic and collateral, not on the paper itself. Accordingly if an agent does not disclose his principal when he sells a negotiable instrument he would be personally liable as a warrantor, but if the agent was acting within his express or implied authority the principal also would be liable.

Article VI—Presentment for Payment

204. SECTION 70.—[EFFECT OF WANT OF DEMAND ON PRINCIPAL DEBTOR.] Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

NOTE.—In the Illinois Act after the word "instrument" are inserted the words: "except in the case of bank notes." In the Kansas, New York and Ohio Acts after the word "maturity" are inserted the words: "and has funds there available for that purpose." In the Wisconsin Act all of the first sentence after the words "on the instrument" is omitted.

205. PRESENTMENT UNNECESSARY TO HOLD PRIMARY PARTY.—The party primarily liable may be sued without any previous demand on the maturity of the instrument. This is true even

though such party does not know who is the holder and the instrument is not made payable at a particular place, so that tender of payment is impossible. It is also true though the instrument is payable on demand. Demand paper is payable without a demand, paradoxical as it may seem.

Presentment, before the passage of the Negotiable Instruments Law, in some jurisdictions at least, was necessary to charge the party primarily liable if the instrument was payable at a particular place; but that is not so now. Even under the Negotiable Instruments Law, however, if presentment was in express terms required by the instrument presumably it would have to be made. It would be possible to write an instrument with such a condition, but that is not done in the ordinary forms of notes.

206. PRESENTMENT IS NECESSARY TO CHARGE PARTIES SECONDARILY LIABLE.—In order to charge parties secondarily liable, on the other hand, presentment to the party primarily liable is always necessary unless the contrary is provided. It is perfectly possible here, also, to provide in the instrument contrary to the general rule. An indorser may agree to be liable without presentment to the maker.

207. TENDER.—Damages may be stopped or limited at any time by tender. Tender stops interest and stops a right to any additional damages subsequent to the time of tender. It is sometimes supposed that tender discharges a debt, but, of course,

that is not so. What is tender? Strictly, tender is an offer of an amount of legal tender money equal to the indebtedness of the person tendering. Nothing but legal tender is sufficient, but unless the creditor requests legal tender, or rather unless he objects to the form in which tender is made, an offer of any ordinary medium of payment, such as a certified check, would be sufficient. The creditor has a right to say, "I want legal tender offered to me," but if he does not say that the certified check will do as well. Tender ordinarily implies an offer to the creditor in person, but not necessarily. Suppose an instrument is payable at a particular place. If the debtor goes to that place ready and willing and able to offer payment, but the creditor is not there, that is a good tender. Accordingly, if a note is payable at a bank, and the maker of the note has on deposit at that bank on the day of maturity an amount sufficient to meet the obligation, that serves as an automatic tender. If the creditor comes to the bank he can get it; if the creditor does not come, the mere fact that the money is at the place waiting for him will stop interest. (Section 70.) The tender will not only stop interest and further damages, but it will also operate as a discharge of subsequent parties on the instrument. It will not discharge the debt as far as the person tendering is concerned, nor as far as any prior party in concerned, but as to subsequent parties it does in effect amount to a discharge. (Section 120 [5]). The reason is that since

the holder, when the tender was made, might have had his money if he had wanted it, it is unfair, when the only reason he does not get paid is his own refusal or neglect, that he should thereafter charge a subsequent party. In order to be valid, the tender must be sufficient in amount.

208. KINDS OF INTEREST.—Not only are there questions arising in regard to the principal sum which is due upon a note, but there are questions in regard to interest. Interest is of two sorts: the first is interest agreed upon by the parties, sometimes called conventional interest, which means interest contracted for; the second kind of interest is given by the law as damages irrespective of any agreement on the part of the parties. Another kind of charge which is somewhat like interest in its nature, though not exactly the same, consists of percentages allowed in lieu of what is called re-exchange, and we shall say a few words in regard to each one of these.

209. CONVENTIONAL INTEREST.—In the first place, conventional interest must be reserved in the note. Unless the instrument says something to the contrary the interest will run from the date of the instrument; that is so provided in section 17 of the statute. If the instrument is not dated, then interest will run from delivery, always assuming that the note provides for interest. A postdated or antedated note will get so much the less or more interest. If the note does not state how long the

interest is to run, as generally it does not, it will run until the note is paid. That seems obvious where the interest is as high or higher than the legal rate, but it is also true if the interest is lower than the legal rate. For instance, suppose a note payable in one year with interest at 5 per cent. is not paid at maturity. Had there been no interest mentioned in the note the interest from maturity would run at the legal rate which is generally 6 per cent. and it sometimes seems hard to the holder of such a note that he should be worse off in having an interest-bearing note, so far as the period after maturity is concerned, than a man would be who had a non-interest-bearing note; but that is the rule. The contract rate governs not only before maturity but after. When the note is reduced to judgment, however, the judgment will bear interest at the legal rate.

210. CONSTRUCTION OF AMBIGUOUS AGREEMENTS FOR INTEREST.—A note not infrequently reads simply, "with interest." That is understood to mean with interest at the legal rate. But sometimes this case is presented: there is a blank form used and the form reads, "With interest at ——," and does not mention any rate, but leaves a blank, or reads "With —— interest." In the first place, that is an incomplete instrument, and any one who takes it with those blanks in it will be obliged to find out at his peril what is the real authority to fill out the blanks. If the parties really

bargained for 5 or 3 per cent. interest, that is all the interest that can be recovered, and if they bargained that there should be no interest we presume that also would be provable and that no interest could be recovered. If the blanks were filled out before maturity and a holder in due course took the instrument, he would be entitled to recover on the instrument according to the way the blanks were actually filled out. We may suppose, however, that the parties when they made the note made no agreement as to interest,—said nothing about it; there would then be no evidence of the rights of the parties except what the note itself furnished. We suppose in that case interest at the legal rate would be allowed, though it has been argued that an instrument reading, "With interest at —— per cent.," or "With —— interest," until the blank is filled out, in effect says with interest at no per cent., or with no interest. It has been decided in one case, however, that the legal rate is the fair meaning.

211. INTEREST AS DAMAGES.—Now about interest recoverable as damages. It follows from what we have already said that such interest is recoverable only in case there is no agreement for interest in the note at all. In such a case interest at the legal rate runs from the maturity of time paper, and on demand paper runs from delivery.

212. CALCULATION OF INTEREST.—A question has been raised as to the calculation of interest. Interest is ordinarily calculated by business

and financial people on the assumption that there are three hundred and sixty days in the year. The result of that method of calculation is frequently that a little more interest is charged than is actually earned; that is, 1-360 of 6 per cent. is charged for each day instead of 1-365. This trivial inaccuracy in the calculation of interest ordinarily makes no difference, but it becomes of importance in certain States where usury laws forbid charging more than a given rate of interest, say 6 per cent. In a State where such a law prevails it might be usurious to charge interest calculated on the basis of three hundred and sixty days to the year, and probably as a matter of strict law, even where there is no usury law, if any one liable to pay interest insisted on having his interest calculated exactly on the basis of three hundred and sixty-five days in the year, so that he would pay only 1-365 of the annual rate for each day instead of 1-360, as commonly calculated, he would be entitled to make that demand. In a few States special statutes have been passed legalizing the ordinary method of calculating interest. Even without such statutes courts have generally concluded that "six per cent." as used in a usury statute means six per cent. as ordinarily calculated by business men.

213. RE-EXCHANGE.—There is one other kind of damages, damages given in lieu of re-exchange. That involves an explanation of what is meant by re-exchange. If a note is payable in one

city and there are half a dozen indorsers on it and the note is dishonored, the holder not only has a claim, after charging the indorsers, against every one of them for the amount of the bill, but also he has a right to the amount of the bill in the place where the instrument was payable. Now suppose the indorsers live in several other cities, as New York, Philadelphia and Chicago. The way that is supposed to be adjusted unless this method is changed by statute is this: the holder in the city where the instrument is payable has a right to draw a draft on the indorsers in New York, Chicago and Philadelphia for such an amount as will equal the face of the note if the draft were discounted in the place where the note was payable; that is, the amount of the draft would be the face of the note plus exchange on the places where the indorsers live. In lieu of that right to re-exchange, the statutes of many States provide that a certain per cent. on a negotiable instrument may be added in charging a party secondarily liable if he lives at a distance from the place where the instrument is payable, the percentage varying with the distance.

214. PROTEST FEES.—Protest fees also may be added as part of the damages due on an instrument, and become part of the obligation of all parties to it.

215. SECTION 71. — [PRESENTMENT WHERE INSTRUMENT IS NOT PAYABLE ON DEMAND AND WHERE PAYABLE ON

DEMAND.] Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

NOTE.—In the Nebraska Act all of the section after the words "reasonable time after its issue" is omitted. In the Vermont Act instead of the last five words of the section are substituted: "after its issue in order to charge the drawer."

216. DATE OF MATURITY IMPORTANT FOR THREE QUESTIONS.—The next question to determine is when an instrument is overdue. That is necessary for several purposes, and unfortunately under our law an instrument may not be overdue for all these purposes at the same moment. There is a good deal of confusion about overdue paper because these several questions which may arise with reference to overdue paper are not kept apart. The first and primary question in regard to when paper is overdue is, When can you sue the party primarily liable? The second question is, When can you give notice of dishonor to parties secondarily liable that the instrument has been dishonored at maturity? The third question is, When is the instrument subject to personal defences if purchased thereafter?

217. IN EUROPE OVERDUE FOR ALL PURPOSES AT THE SAME TIME.—Under the

practice on the continent of Europe, (see paragraph 321), of marking on the face of a bill the fact of its dishonor or its payment on presentment, the difficulties that beset our law in regard to this matter do not occur. The answers to each of these three questions on the continent of Europe will always be the same. As soon as there is a right of action against the maker then will always be the time to give notice, and thereafter the instrument will always pass subject to equities. But now let us see how it works in this country.

218. WHEN RIGHT OF ACTION ARISES IN THE UNITED STATES.—It is the rule in simple contracts that when a man contracts to do something on a given day he has until the last minute of that day to satisfy his obligation. That is true both of contracts to pay money and of contracts to do other things. If by a simple contract one agrees to pay $1,000 on the 2d of January, he cannot be sued on that obligation until after the last minute of the 2d of January has expired, for until that last minute it is possible he may fulfill his contract. The result is that a right of action will not accrue on that contract until the 3d of January. That principle, unfortunately, has been applied rather generally to negotiable instruments. If a note is by its terms payable on the 2d of January the general rule is that no action can be begun against the parties until the 3d of January. The instrument is not overdue so far as the maker is con-

cerned until then. That is probably contrary to the theory and customs of bankers and merchants. The theory of bankers and merchants is that the maker of the instrument agrees that he will pay it on presentment on the 2d of January, that the maker is not entitled to the last minute of the day, that he must be ready at the beginning of the business day, and that whenever his creditor presents that instrument to him on that day he must pay it. Now the law in Massachusetts and Maine, unlike the law of most of the United States, has to some extent recognized this custom. It has recognized it to this extent: if there is an actual presentment on the 2d of January and dishonor, a right of action against the maker arises immediately in favor of the holder; he does not have to wait until the last minute of the day, and therefore does not have to wait until the 3d of January to sue. But it is law in Massachusetts and Maine, as it is elsewhere, that if presentment is not made on the 2d of January (and under the Negotiable Instruments Law there is in general no reason to make presentment except to charge the indorsers, and therefore a note without indorsers need not be presented) the maker is not liable to suit until the 3d of January. The day of maturity is also affected by Sundays and holidays. If the day of maturity falls on Sunday or a holiday, the instrument is not payable until the next business day, and time instruments payable on Saturday must also be presented on the next business day. (Section 85.)

So much for an instrument being overdue for the purpose of a right of action against the party primarily liable.

219. WHEN INSTRUMENT IS OVERDUE FOR OTHER PURPOSES.—Secondly when is an instrument overdue for the purpose of charging indorsers? For that purpose it is everywhere overdue as soon as it is presented and dishonored on the day of maturity (Sections 71, 83, 102), and thirdly when it is overdue for the purpose of letting in equities. Everywhere but in Massachusetts, so far as it has been decided, the instrument is overdue for the purpose of letting in equities only on the day after that on which it falls due, that is, on the 3d of January. A purchaser on the 2d of January, unless he had notice that the instrument had been presented and dishonored, would be a holder in due course. One in Massachusetts who purchases on the 2d of January is not a holder in due course, unless Section 52 of the Negotiable Instruments Law has changed the law previously existing in that State.

220. WHERE AN INSTALLMENT OR INTEREST IS UNPAID.—One may suppose some rather special cases in regard to overdue paper; for instance, suppose an instrument payable in installments and one installment overdue and unpaid. Is that instrument, as a whole, dishonored? The answer to that is, yes. On the other hand, if merely interest is due and unpaid the note is not dishon-

ored. A case arose in Wisconsin where the instrument provided that if the interest was unpaid the note should thereupon become due. The interest was unpaid and the note was purchased before the day it was due by its original terms, but the Wisconsin court held that the purchaser was not a holder in due course. He had bought after maturity, since the non-payment of interest made the whole note due.

221. WHEN RIGHT OF ACTION ACCRUES ON DEMAND PAPER.—A more troublesome question than that concerning the date of maturity of time paper is the date of maturity of demand paper, and here again we must make the distinction clear between these several questions of when a right of action arises, when the instrument is subject to equities, and when notice may be given to indorsers. On demand paper a right of action against the maker arises immediately as soon as it is delivered. By the terms of the paper it might be supposed that demand was a prerequisite to such a right of action, and on theory it ought to be, but as has been said, in this country and England it is not. (Section 70.)

222. MATURITY OF DEMAND PAPER TO CHARGE INDORSERS.—The holder may make a demand on the maker within a reasonable time after the issue of the instrument for the purpose of charging indorsers, the instrument maturing at any time within that limit that the holder wishes to pre-

sent it. (Section 71.) He may demand payment at once of the party primarily liable, and on his refusal to pay and notice to the indorser, he will acquire a right of action against the latter.

223. WHAT IS A REASONABLE TIME FOR A BILL OF EXCHANGE.—Section 71 of the statute provides that in case of a bill of exchange payable on demand, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. That provision is clearly a blunder. The rule before the passage of the Negotiable Instruments Law was that a demand bill of exchange might be negotiated as many times as the holder chose before presentment, provided that an unreasonable time never elapsed between one negotiation and the next; that is, it could be kept in motion, and so long as it was kept in motion it would not matter what was the total addition of the short periods between the several indorsements. But this section of the Negotiable Instruments Law says that it is all right if presentment is made within a reasonable time after the last negotiation. Apparently, therefore, we may have a demand bill of exchange and hold it for five years and then negotiate it, and everything will be all right if the bill is presented within a reasonable time after the last negotiation.

224. SECTION 72.—[WHAT CONSTITUTES A SUFFICIENT PRESENTMENT.] Presentment for payment, to be sufficient, must be

made:—(1) By the holder, or by some person authorized to receive payment on his behalf. (2) At a reasonable hour on a business day. (3) At a proper place as herein defined. (4) To the person primarily liable on the instrument or if he is absent or inaccessible, to any person found at the place where the presentment is made.

225. PRESENTMENT FOR PAYMENT.—Presentment for payment is, as we have said, necessary to charge parties secondarily liable. It may be asked when presentment must be made, to whom it must be made, by whom it must be made, and the place where it must be made.

226. TIME OF PRESENTMENT.—As to the time, it must be at maturity of the instrument, if the instrument is a time bill, and if it is a demand instrument presentment must be made within a reasonable time. (Section 71.) The hour of the day when presentment is made must be reasonable. (Section 72 [2].) What is a reasonable hour of the day may depend on who is the drawee. In Chicago a case arose where it appeared that it was the business custom of banks to remain open between 3 and 6 o'clock, having some one in charge for the purpose of receiving presentment of instruments which had been rejected at the Clearing House. It was held in view of this custom that a presentment within these afternoon hours was presentment at a reasonable hour of the day. Unless, however, it was the custom of the banks to stay open after 3 o'clock

it would not be reasonable to seek to present to the bank, as the party primarily liable on the instrument, after 3 o'clock in the day. (See also Section 75.) But if the drawee was a business man in the same city, and the normal hours of his business extended until 5 or 6 o'clock, presentment as late as that might be permissible.

227. BY WHOM AND TO WHOM PRESENTMENT MUST BE MADE.—Now by whom must presentment be made? It must be made, as is provided in Section 72 of the act, by the holder or some person authorized by him to receive payment. It must be presented to the person who is primarily liable on the instrument, or to the drawee of the bill of exchange or check, if there has been no acceptance of the bill or certification of the check. If the person primarily liable on the instrument is not at the place where presentment should be made, but somebody else is, payment should be demanded from him. He may be the authorized agent of the person primarily liable. If there are joint parties primarily liable, it must be presented to both (Section 78) unless they are partners, in which case presentment to one is enough. (Section 77.) If the party primarily liable is dead presentment must be made to his executor or administrator. (Section 76.) In any of these cases, however, if a place of payment is specified in the instrument, presentment at that place on the day of maturity is sufficient.

228. SECTION 73.—[PLACE OF PRESENT-

MENT.] Presentment for payment is made at the proper place:—(1) Where a place of payment is specified in the instrument and it is there presented. (2) Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented. (3) Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment. (4) In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

229. IMPORTANCE OF SPECIFYING A PLACE OF PAYMENT IN NEGOTIABLE INSTRUMENTS.—It is worth while to call attention to the importance of having negotiable instruments always made payable at a particular place. This simplifies the duty of the holder. All he has to do is present the instrument there. It is also an advantage for the debtor, for all he has to do to make tender in order to stop interest is to have money at the place where the instrument is made payable. If there is no place of payment named, each party is at a disadvantage, for the debtor can never tell who may be holder at maturity; he has to depend on receiving notification of that, which may not be given him, and therefore he is unable to stop interest because the note may be negotiated to he knows not whom. The creditor is at a similar disadvantage if no place of payment is named, for he cannot tell where to make presentment.

230. SECTION 74.—[INSTRUMENT MUST BE EXHIBITED.] The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

231. PRESENTMENT INVOLVES SHOWING THE INSTRUMENT.—Presentment implies showing the instrument. It is not enough to demand payment. It is requisite for the creditor to say, in effect, "Here is the instrument on which you are liable and which I am ready to surrender on receiving payment." A New York case arose a short time ago of an attempted presentment over the telephone, and the party primarily liable refused payment. The question was whether the parties secondarily liable could be charged on that presentment. A lower court in New York held that they might be, that the showing of the note was waived by the party primarily liable. We are not sure that the decision was right. Presentment is for the benefit, not of the party primarily liable, but of the parties secondarily liable. The parties secondarily liable have a right to say, "We will not pay unless there has been proper presentment." Now it seems that it can hardly be proper presentment unless the instrument is actually brought within reach of the party primarily liable and in effect offered to him. If presentment is good over the telephone from one bank to another in New York City, why is it not good as between New York and

Chicago, without sending the note to Chicago at all, where it is payable?

232. SECTION 75.—. [PRESENTMENT WHERE INSTRUMENT PAYABLE AT BANK.] Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

NOTE.—The Nebraska Act ends with the words "banking hours."

233. COMMENT ON SECTION 75.—What is meant by "banking hours" depends upon the custom of the place of payment. Often a bank transacts the business of paying negotiable paper of certain kinds after the hour when ordinary deposits are received and checks cashed. Thus, as has been said, in Chicago it appeared to be the custom for banks to remain open between three and six o'clock P. M. for the purpose of meeting certain demands. A presentment of negotiable paper which was a demand of this sort was held seasonable when made between these hours.

234. SECTION 76.—[PRESENTMENT WHERE PRINCIPAL DEBTOR IS DEAD.] Where a person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if, with the exercise of reasonable diligence, he can be be found.

235. COMMENT ON SECTION 76.—It is important to be sure that the person primarily liable is dead. Reasonable cause to believe him dead is not enough; and in an action against a party secondarily liable, death must be proved. Moreover, though death excuses presentment, it does not excuse the requisite notice of dishonor to parties secondarily liable.

236. SECTION 77.—[PRESENTMENT TO PERSONS LIABLE AS PARTNERS.] Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

237. LIABILITY OF PARTNERS AND OTHER OBLIGORS.—Partners are jointly liable in most jurisdictions, (in a few they are liable jointly and severally) but there is this difference between joint obligors who are partners, and other joint obligors. Each partner is agent for the firm in all matters appropriate for the transaction of the firm's business. This includes the payment of negotiable paper; therefore presentment to one is in effect presentment to all.

238. SECTION 78.—[PRESENTMENT TO JOINT DEBTORS.] Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

239. COMMENT ON SECTION 78.—Though

this section is headed in the Statute—"Presentment to joint debtors," the heading is too narrow, for the section is applicable not simply to cases of joint liability, but to cases of persons severally liable or jointly and severally liable. If the parties primarily liable are liable severally, or jointly and severally, each one may be sued separately; whereas if they are jointly liable, all must be sued jointly. But so far as charging parties secondarily liable is concerned, the situation is the same in all these cases. The indorser or drawer ought not to be held liable until it has been made manifest by due presentment that no one of the parties primarily liable will pay the instrument; and this can only be ascertained by presentment to all of them. A case may be supposed where strict presentment is not possible on the day of maturity to each of the parties primarily liable; they may live at places distant from one another, and the instrument may not be payable at a particular place, but the provisions of Section 81, would excuse necessary delay.

240. SECTION 79.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE DRAWER.] Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

241. EXCUSES FOR NON-PRESENTMENT.—In certain cases non-presentment is excused. Sometimes it is excused altogether, as is provided in Sections 79, 80 and 82, and sometimes

it is excused merely temporarily, as provided in Sections 81 and 147. It is excused altogether, the statute provides, wherever the party secondarily liable, who might complain of non-presentment, had no reason to expect that the instrument would be paid if presented. The common illustration of such a case is that of a drawer who has no funds or agreement for credit with the drawee. Such a drawer is liable without presentment to the drawee. Even though the holder was ignorant of the facts and supposed the drawee was bound to pay, failure to present being due simply to negligence, the result is the same.

242. SECTION 80.—[WHEN PRESENTMENT NOT REQUIRED TO CHARGE THE INDORSER.] Presentment for payments is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented.

243. ACCOMMODATION PAPER.—The principle of the last section finds particular application also in case the instrument was made for the accommodation of the party secondarily liable, and therefore he himself ought to pay it, for it is the understanding, where paper is made for the accommodation of one who is secondarily liable on the instrument, that he shall save harmless the party who became primarily liable on the instrument, as matter of accommodation, and shall himself pay the instrument at maturity. Such a person secondarily

liable on the instrument, whether he is a drawer (Section 79) or an indorser (Section 80) has no right to complain if the instrument is not presented to the party who is primarily liable.

244. SECTION 81.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable deligence.

245. TEMPORARY EXCUSES FOR PRESENTMENT.—Presentment may be excused temporarily. This will be true whenever circumstances occur without the fault of the holder which make presentment at maturity impossible but do not make it permanently impossible. (Sections 81, 147.) A common illustration of this would be where the maker of a note died and no executor or administrator had been appointed. That would excuse delay in presentment until the appointment of such an official, but when the cause of the delay ceased to operate, presentment would have to be made with reasonable diligence.

246. SECTION 82.—[WHEN PRESENTMENT MAY BE DISPENSED WITH.] Presentment for payment is dispensed with: (1) Where after the exercise of reasonable diligence presentment as required by this act cannot be made. (2) Where the drawee is a fictitious person. (3) By waiver of presentment, express or implied.

247. INABILITY TO FIND PERSON PRIMARILY LIABLE.—Presentment for payment is also excused where, after reasonable diligence, the presentment cannot be made, as, for instance, if it is impossible, with reasonable diligence, to find the person primarily liable in order to make presentment to him. Again, where the party primarily liable is a fictitious person, it is obvious there can be no presentment. (Section 82.)

248. WAIVER OF PRESENTMENT.—Another case and an important one is where presentment is waived. The waiver may be expressed or implied. (Section 82.) Sometimes it is made at the time when the obligation of the drawer or indorser is undertaken. If waiver is made at this time, the consideration which supports this party's obligation also supports the agreement to waive presentment. Waiver of presentment may also be made after the drawer or indorser has signed, but prior to the day of maturity. In such a case the holder is justified in relying on the waiver and refraining from making presentment. There is what is called in the law a kind of estoppel in that case, since the holder's failure to make the presentment has been due to his reliance on the waiver. But the law has gone even farther than this. Suppose the instrument has actually passed maturity and no presentment has been made, and therefore the party secondarily liable has been wholly discharged. Even then a waiver of presentment may be effec-

tively made by him. In this case it is a waiver of a past default. That is an exceptional sort of case, for generally an agreement to give up a right requires consideration in order to make it valid, but here the party secondarily liable gives up his right to rely on the lack of presentment as a ground of discharge without any consideration. In order, however, to have a waiver of this last sort effective, the party who waives presentment must do so with knowledge of the facts; that is, he must know that the time for presentment has elapsed, and that there has been a failure to make due presentment. But it is not necessary for the validity of such a waiver that the party making it should know his legal rights; that is, it is not necessary that he should know that the lack of presentment had discharged him. It is only necessary that he should know the facts from which a lawyer would know that he had been discharged.

249. OTHER ILLUSTRATIONS OF EXCUSES FOR PRESENTMENT.—We will give one or two other illustrations of cases where it was claimed that presentment had been excused. In one case the president of a corporation indorsed the note of the corporation and before the maturity the maker was adjudged a bankrupt, one of the acts of bankruptcy of the bankrupt maker being the written admisssion of the indorser, the president of the corporation, that the corporation was unable to pay its debts and was willing to be declared a bankrupt.

It was held on these facts that it was not necessary to present the note to the corporation—the maker—in order to charge the indorser. He had no reason to expect that the note would be paid; indeed, he had every reason to know that it would not be. In another case the indorsers of a note had assured the holder that it could not be paid at maturity, and they knew that the maker, again a corporation, had not the money to pay. It was held these indorsers were not discharged by the failure to present at maturity. They had virtually represented to the holder that there was no use in making presentment, and after they had taken that stand they could not complain that the holder relied upon it. Again, a firm made a note and one of the partners indorsed it. Shortly before maturity the indorser, in speaking to the holder regarding a general assignment for the benefit of creditors which the firm was contemplating, told the holder that neither the firm nor he could pay the note at maturity, and no presentment was made, and here again it was held that there was a waiver. A still stronger case is where the indorser assured the holder before maturity that he, the indorser, would be responsible for principal and interest when it was due and would look after the collection. In short, any statement before maturity made by a party secondarily liable, the natural effect of which would be to induce the holder to refrain from making presentment to the party primarily liable, either because it was of no use to

do so or because it was unnecessary to do so, since the party secondarily liable was going to pay it any way, will excuse presentment.

250. DISTINCT AGREEMENT NECESSARY FOR WAIVER AFTER MATURITY.—But when it comes to a waiver after maturity, then you must have either a distinct promise to pay the note or a distinct agreement to waive it. The difference between the situation after maturity and before is, that after maturity the holder has already lost his rights by failing to make presentment at maturity, and in order to revive them a clear intention to pay is necessary.

251. SECTION 83. [WHEN INSTRUMENT DISHONORED BY NON-PAYMENT.] The instrument is dishonored by non-payment when—(1) It is duly presented for payment and payment is refused or cannot be obtained; or (2) Presentment is excused and the instrument is overdue and unpaid.

252. COMMENT ON SECTION 83.—Dishonor is important as one of the steps essential in order to charge parties secondarily liable. It is not important otherwise, for as we have seen so far as parties primarily liable are concerned, a right of action accrues to the holder though the instrument has not been dishonored on presentment.

253. SECTION 84.—[LIABILITY OF PERSON SECONDARILY LIABLE, WHEN INSTRUMENT DISHONORED.] Subject to the provisions of this act, when the instrument is dis-

honored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

254. COMMENT ON SECTION 84.—The words "subject to the provisions of this Act" in this section, refer to the necessity of notice of the dishonor. As will be seen, parties secondarily liable can not usually be held unless prompt notice is given of the dishonor.

255. SECTION 85.—[TIME OF MATURITY.] Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due [or becoming payable] on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday.

NOTE.—The words in brackets [or becoming payable] have been inserted for the sake of clearness. They are found in the Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New York and Virginia Acts. This section having twice used the word "payable" then uses the words "falling due." This has raised doubts in the minds of some where Friday is a legal holiday and paper matures on Friday. These words are inserted to remove any possible doubt. Sight drafts are excepted from the abolition of days of grace in Massachusetts, North Carolina and New Hampshire. The provision of the section in regard to Saturday is omitted in Arizona, Kentucky, Vermont and Wisconsin.

256. GRACE AND HOLIDAYS.—There are

no days of grace now in States where the Negotiable Instruments Law is in force (except on sight drafts, payable in Massachusetts, New Hampshire or North Carolina). Sundays and holidays are included in the count as intermediate days, that is, it does not make any difference how many Sundays and holidays there may be within the thirty days, but if the thirtieth day falls upon a holiday then the instrument is payable the next succeeding business day. The rule is otherwise where days of grace are concerned. If the last day of grace falls on a holiday, the instrument is due on the next preceding business day, for days of grace are never extended beyond three days. This principle is still important where the Negotiable Instruments Law is not in force, and also in regard to sight-drafts in the three States above mentioned.

257. SECTION 86.—[TIME; HOW COMPUTED.] Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

258. COMMENT ON SECTION 86.—In considering when an instrument has matured we must consider separately instruments payable on time and instruments payable on demand. In calculating the period for the latter the statute provides that the first day shall be excluded and the day of

payment included. For instance, on a note dated the 2d of January, payable in thirty days, you do not count the 2d of January in figuring the time, but you do count thirty days beginning with January 3, and the thirtieth day will be the day of payment. It would, of course, make no difference if you included the 2d of January and excluded the day of maturity. The important thing is that you must not include both or exclude both.

259. SECTION 87.—[RULE WHERE INSTRUMENT PAYABLE AT BANK.] Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

NOTE.—This section is omitted in Illinois, Nebraska and South Dakota, and has been repealed in Kansas. In Minnesota the section is retained but instead of the words "it is equivalent" are substituted "it shall not be equivalent."

260. DOMICILED NOTES.—It was a disputed question in the common law whether making a note payable at a bank was equivalent to an order on the bank to pay. The better view was in accordance with the present provision of the statute that this did amount to an order, and therefore made such a note (which was sometimes called a domiciled note) in effect a bill of exchange drawn on the bank. The coupons on bonds are frequently made payable in this way. In some jurisdictions, however, there has been hostility to this principle, and sometimes it was argued that making an instrument payable at a bank only gave authority to the bank to make pay-

ment, but did not order it so to do. Others argued that there was neither order nor authority. The omission of this section of the statute in a few States, leaves the matter in somewhat dubious condition in those States. By Section 196 of the Negotiable Instruments Law, in the absence of an express provision on any point, the rule of the law merchant applies, and as it is somewhat uncertain what the rule of the law merchant on this matter is, there is chance for litigation.

261. SECTION 88.—[WHAT CONSTITUTES PAYMENT IN DUE COURSE.] Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

262. PAYMENT IN DUE COURSE.—We have discussed in connection with personal defences the rights of holders in due course, that is, purchasers for value in good faith before maturity and without notice; but a bank is as much interested in payment of instruments in due course as it is in regard to purchases of them in due course. In general, the rules as to what is payment in due course are the same as the rules in regard to what is purchase in due course. In other words, one who pays under the same circumstances in regard to notice and value and good faith as a purchaser who purchases in good faith for value and without notice, will be protected in the same way. But in one

respect a person who pays in due course stands in a better position than one who purchases in due course; or, rather, payment in due course is a little wider in one respect than purchase in due course. One is not a purchaser in due course who buys after maturity, but one who pays after maturity an instrument on which he is liable is as much protected as if he paid at the instant of maturity, and the reason for the distinction is plain. Nobody needs to buy paper after maturity unless he likes, but the maker of a note, from whom payment is demanded a year after maturity, is just as much bound to pay that note as if payment had been demanded promptly. It is therefore paying in due course to pay when payment is demanded, even if that be long after maturity. A bank will accordingly pay a check even though it is not presented within a reasonable time. Whether there is any limit to this principle may perhaps be a question. Perhaps a bank would not without inquiry pay a check that was issued several years previously; certainly not unless it felt pretty well satisfied that everything was all irght. But so far as the statute (Section 88) and the decisions go, no limit seems to have been set to the right of the parties liable on an instrument to pay after maturity, and a long time after. The position of a bank or a drawee who has not accepted the instrument is of course a little different from the position of one who has actually made himself liable on the instrument,—as the maker of a

note or the acceptor of a bill, or a certifying bank which has certified a check. As to such a person there seems to be no period short of the Statute of Limitations in which payment may not be demanded rightfully, and therefore no time beyond which the party liable may not properly pay.

Article VII—Notice of Dishonor

263. SECTION 89.—[TO WHOM NOTICE OF DISHONOR MUST BE GIVEN.] Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

264. NOTICE OF NON-PAYMENT NECESSARY TO CHARGE SECONDARY PARTIES. —After presentment has been duly made, if the party primarily liable pays, of course the parties secondarily liable are excused. If the party primarily liable does not pay, then it is further necessary that the parties secondarily liable shall be notified, or at least that proper diligence shall be exercised in order to charge them. (Section 89.) This principle applies to all parties secondarily liable, even to the drawer of a check. By Section 186 the drawer of a check is not discharged by failure to present promptly, except to the extent that this delay actually works an injury; but presumably by a mistake

on the part of the draughtsman of the act, no special provision is made as to failure to give notice of dishonor of a check, and, therefore, by virtue of the general provision in Section 89 such failure discharges the drawer absolutely, whether he is injured or not. All indorsers, either on checks, ordinary bills of exchange or notes, must be notified. A joint maker need not be notified, even though he is a surety and that fact is stated in the note or known to the holder.

265. EXCUSE FOR PRESENTMENT DOES NOT EXCUSE NOTICE.—An excuse for making presentment does not excuse the failure to give notice. A waiver of presentment is construed as including a waiver of notice, but a mere excuse for not presenting does not excuse the notice. Indeed, frequently when presentment is excused the occasion is such that the indorser may particularly want notice. Thus if presentment cannot be made because the party primarily liable cannot be found, then the indorser ought to be notified of that so that he may, if he wishes, endeavor to find the missing party.

266. SECTION 90.—[BY WHOM GIVEN.] The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right of reimbursement from the party to whom the notice is given.

267. BY WHOM NOTICE SHOULD BE GIVEN.—Notice may, of course, be given by the holder. But it may also be given by any one who acts on behalf of the holder. Even though he is not at the time an authorized agent of the holder, the latter may ratify subsequently the assumption of agency. Not only may the notice be given by or on behalf of the holder, but by or on behalf of any party to the instrument who might be compelled to pay the holder, and who upon taking it up would have a right to reimbursement from the party to whom the notice is given. Let us give an illustration. Suppose a note made by A and indorsed by B, C and D, respectively,—first, second and third indorsers. D, if compelled to pay, will have a right of recourse against C and B. It is therefore important for D that B and C should receive due notice. Accordingly, D may notify B and C, and the notice that D thus gives will be as effective as if it were given by the holder. Similarly, C might notify B, but C could not effectively notify D, because even if C is compelled to take up the paper he will have no right of reimbursement from D, and therefore it is nothing to him whether D is charged or not. B cannot effectively give notice to anybody for the same reason, for if he is compelled to pay, there is no party who is secondarily liable against whom he would have any recourse.

268. SECTION 91.—[NOTICE GIVEN BY AGENT.] Notice of dishonor may be given by an

agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

269. COMMENT ON SECTION 91.—This section extends the ordinary principles of agency, since it allows notice to be given in the name of a party entitled to give notice though that party is not in fact the principal of the agent. A notice given by a notary in the name of the maker (who because he is the party primarily liable was not entitled to give notice) has, however, been held insufficient.

270. SECTION 92.—[EFFECT OF NOTICE GIVEN ON BEHALF OF HOLDER.] Where notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

271. COMMENT ON SECTION 92.—When a party secondarily liable is once charged by notice from the holder, any one who succeeds to the title of the holder succeeds to the benefit of the notice, and it makes no difference whether the subsequent holder succeeds to the title by purchase or because he is a prior party on the instrument and has been forced to take up the instrument. The holder, however, is not bound to charge any party whom he does not wish to. He may be satisfied to charge his immediate indorser feeling sure he can get payment from him. This indorser if he wishes recourse over against prior parties whom the holder has not

charged, must assume the burden of giving them proper notice. It is, obviously never safe to assume that a holder has charged all prior parties, so that any party secondarily liable when charged himself should promptly give notice to prior secondary parties.

272. SECTION 93.—[EFFECT WHERE NOTICE IS GIVEN BY PARTY ENTITLED THERETO.] Where notice is given by or on behalf of a party entitled to give notice, it enures for the benefit of the holder and all parties subsequent to the party to whom notice is given.

273. ILLUSTRATION OF SECTION 93.—As not only the holder but other persons, as we have seen, are entitled to give notice, the same principle is applicable to other persons as is laid down in the preceding section as applicable to the holder. That is, for instance, if notice is given to the drawer of a bill of exchange by the first indorser, the holder can rely on that notice, as can all parties subsequent to the drawer.

274. SECTION 94.—[WHEN AGENT MAY GIVE NOTICE.] Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon the receipt of such notice himself the same time for giving notice as if the agent had been an independent holder.

275. ILLUSTRATION OF SECTION 94.—This provision is of some importance to banks for banks are often agents for collection. Thus, where the instrument has been dishonored when in the hands of an agent for collection, that agent may either give notice to the party liable on the instrument or he may give notice to his own principal, and if he gives such a notice to his principal within the period that is necessary as between holder and indorser, the principal will have the same time in addition for giving notice to the drawer and indorsers.

276. SECTION 95.—[WHEN NOTICE SUFFICIENT.] A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

NOTE.—Under the Kentucky Act, the notice must be written and signed.

277. FORM OF NOTICE.—What sort of thing is a notice? In the first place, the notice may be oral as well as written, or partly oral and partly written. If written, it need not be signed, but a holder should always give notice in writing and sign it. He would be foolish, also, not to keep a copy of the writing. This is not because these things are legally necessary, but to have ready means of proof. The notice should properly contain a sufficient description to identify the instru-

ment, and should state that it has been dishonored either by non-acceptance or non-payment. A mistake in the description of the instrument, however, does not invalidate the notice, if the party secondarily liable is not in fact misled, as he would not be if there was no other note on which he was bound. It is well enough to state in the notice that the party secondarily liable is looked to for payment, but that is not necessary because it is implied from the mere circumstances of giving notice.

278. SECTION 96.—[FORM OF NOTICE.] The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

279. KNOWLEDGE IS NOT EQUIVALENT TO NOTICE.—A rather hard case presents these facts: a notice of dishonor and an envelope containing it were addressed to the second indorser, but they were delivered to the first indorser who read the notice. It was held, nevertheless, that he was not charged. The case brings out the important point that knowledge on the part of one secondarily liable that there has been presentment and dishonor is not a substitute for notice. We suppose the reason is that a notification, although it may simply contain a statement of the fact that the instrument has been dishonored, impliedly contains notice that the holder looks to the party secondarily liable for

payment, and mere knowledge from outside sources that the instrument has been dishonored does not necessarily indicate to the party secondarily liable that the holder is going to look to him for payment.

280. SECTION 97.—[TO WHOM NOTICE MAY BE GIVEN.] Notice of dishonor may be given either to the party himself or to his agent in that behalf.

281. TO WHOM NOTICE MAY BE GIVEN. —Notice may be given either to the party secondarily liable himself or to his agent in that behalf, but here you must have a real agency, the scope of which includes receiving such notice, because there will never be any ratification of a notice given to one who purports to be the agent of a party secondarily liable though not such in reality. Persons secondarily liable will always be too glad to get out of liability to ratify. The question of what is a sufficient agency is rather an important one, especially in the case of a corporation. In a recent New York case a notice was left at the cash window of a hotel corporation, which was a party secondarily liable. It was held that that notice was not sufficient, as it did not in fact reach the hands of any person in authority. In a case of this sort it is oftener safer to send a notice by mail than to attempt to make a personal delivery, for in case of a notice sent by mail, if it is correctly addressed, the responsibility of safe arrival of the notice is on the person to whom it is addressed, whereas if the holder at-

tempts a personal delivery he must at his peril make a delivery to the right person.

282. SECTION 98.—[NOTICE WHERE PARTY IS DEAD.] When any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

283. COMMENT ON SECTION 98.—This section provides a rule for a difficult situation. In many of these doubtful cases a cautious person will give notice in more than one way in order to make sure that he has done everything that could possibly be required.

284. SECTION 99.—[NOTICE TO PARTNERS.] Where the parties to be notified are partners, notice to any one partner is notice to the firm even though there has been a dissolution.

285. COMMENT ON SECTION 99.—As partners are agents for each other in the firm business, the rule stated in this section is a natural one, and the same rule would apply to other joint parties where one had authority to receive notice for the other, even though the parties were not partners.

286. SECTION 100.—[NOTICE TO PERSONS JOINTLY LIABLE.] Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others.

287. COMMENT ON SECTION 100.—The

reason why each party must receive notice is similar to the reason which requires presentment to each of several persons primarily liable. Each has his own interest to protect and should be given a chance to protect it.

288. SECTION 101.—[NOTICE TO BANKRUPT.] Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

289. COMMENT ON SECTION 101.—Though the statute permits notice to be given to either the insolvent, or to his trustee or assignee, the wise plan is to give notice to both.

290. SECTION 102. — [TIME WITHIN WHICH NOTICE MUST BE GIVEN.] Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

291. COMMENT ON SECTION 102.—A notice cannot be given until the instrument is actually dishonored. On the other hand it may be given on the same day that the instrument is dishonored. An ordinary debt may be paid by the debtor at any hour of the day when the debt falls due. The fact that the debtor has not paid in the morning, or has even refused to pay in the morning, does not put him in default. He may pay in the afternoon; but a party primarily liable on a negotiable instrument

is bound to pay on presentment at any time during business hours. If an instrument is presented to him at 9 o'clock it is dishonored, although he says he will pay it at 10 o'clock. As we have seen he cannot himself be sued until the next day, but the parties secondarily liable may be effectively notified at once of the dishonor.

292. SECTION 103.—[WHERE PARTIES RESIDE IN SAME PLACE.] Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times—(1) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following. (2) If given at his residence, it must be given before the usual hours of rest on the day following. (3) If sent by mail, it must be deposited in the postoffice in time to reach him in usual course on the day following.

293. ILLUSTRATION OF RESIDENCE.—The statute distinguishes in regard to notice between cases where the person to be notified resides in the same city or town as the person giving the notice and cases where he does not. If both reside in the same city or town notice, if given personally, must be given by the next day following, at a reasonable hour. If sent by mail it must be mailed in time to reach the party to be notified in the normal course of business on the next day following. It makes no difference that it does not reach him, all that is necessary is that it shall be mailed so that it

normally would. If given at the place of business it must be before the close of business hours; if made at the residence of the party to be notified, any time before the usual hour of retiring is sufficient, and the same distinction between place of business and place of residence is important if the notice is sent by mail. Suppose the usual hours of business close at 5 o'clock, then a notice by mail addressed to the place of business would have to be mailed so as normally to reach the party before that hour, whereas if addressed to the home of the indorser the notice would be mailed in time, if by the normal course of post, it would reach the indorser's residence by 6 or 7 o'clock.

294. EFFECT OF SUNDAYS AND HOLIDAYS AND SATURDAYS.—The question may be raised how a holiday or Saturday affects this question. The act provides broadly, in Section 194, that anything that is required to be done on Sunday or a holiday may be done on the next succeeding business day. We suppose, therefore, that the period for giving notice is extended by this provision so far as holidays and Sundays are concerned, but there is no such general provision as to Saturday. There is a provision as to presentment of notes maturing on Saturday, (Section 85), but there is none in regard to notice on Saturday. It would seem, therefore, that the general rule as to notice on any ordinary day would also be applicable to Saturday, except that a notice required to be

mailed so as to arrive, in normal course of mail, during business hours would have to be mailed earlier if it were expected to arrive on Saturday than if expected to arrive on another day.

295. SECTION 104.—[WHERE PARTIES RESIDE IN DIFFERENT PLACES.] Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:—(1) If sent by mail, it must be deposited in the postoffice in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter. (2) If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

296.—ILLUSTRATION OF SECTION 104.—Where the party notifying and the party to be notified reside in different places the notice if sent by mail must be deposited in time to go on the day following the day of dishonor, or if there is no mail at a convenient hour on that day, by the next mail thereafter. If the only mail left a place at 6 A. M. it would be enough to mail a notice in time to go out at 6 A. M. on the next day but one after the day of dishonor. But it has been held in Wisconsin, and we suppose it is clearly right, that where the daily mail left between 9 and 10 o'clock in the morning that was a convenient hour, and the notice must be mailed so as to catch that mail on the

day following the day of dishonor. The notice may be given otherwise than through the postoffice, and then the test is whether it is given within the time that notice would have been received in due course by mail if it had been properly sent.

297. SECTION 105.—[WHEN SENDER DEEMED TO HAVE GIVEN DUE NOTICE.] Where notice of dishonor is duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

298. TELEGRAPHIC NOTICE.—The question may be asked about a telegram. In one respect that would be different from the mail. Telegraphic notice would be all right if it were received in time, but if it were not received in time even though reasonably sent, the telegraph company's misconduct, or deficiency would not be at the risk of the party to be notified, but of the party attempting to use that means. It is only the mail which the statute provides way be used at the risk of the party to be notified.

299. SECTION 106.—[DEPOSIT IN POSTOFFICE; WHAT CONSTITUTES.] Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.

300. DELIVERY TO A CARRIER.—Under the federal postal regulations it is the duty of a letter carrier not only to deliver letters but to receive

them when tendered. Accordingly it may be supposed that delivery to a letter carrier when he is engaged in the course of his business would be in legal effect a deposit in the postoffice.

301. SECTION 107.—[NOTICE TO SUBSEQUENT PARTY; TIME OF.] Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

302. SUCCESSIVE NOTICES TO SEVERAL PARTIES.—When notice is properly given to one party secondarily liable, he has the same time to give notice to antecedent parties. This raises rather a curious situation sometimes. Suppose the holder gave prompt notice to the last of four or five indorsers, and also gave notice, but not promptly, to the first indorser; the latter notice is ineffective. But suppose notice had been given by the last indorser to the one before, and so in turn each indorser seasonably notifies the preceding one until finally the first indorser is notified by the second; that is a good notice to the first indorser, although it arrives a week or a fortnight later than the other one which was a bad notice; and under Section 93, that second notice would not only inure to the benefit of the indorser who sent it, but it would inure to the benefit of the holder. There is one method of sending notice to earlier indorsers which was upheld in a case decided in Massachusetts fifty

or sixty years ago, but we are not sure whether the method is commonly in use now; that is, by mailing notices to all the indorsers under one cover to the last indorser, leaving him to forward the notices to the earlier indorsers. Of course, if he does so promptly there is no doubt that such notices are timely (Section 107) and inure to the benefit of the holder, but it was further held in this case to be a proper method of notification, charging all the indorsers, even though the last indorser did not forward the notices to the earlier indorsers. It has been held in New York, however, that this is not a sufficient way of giving notice. It cannot be recommended as a safe practice.

303. SECTION 108.—[WHERE NOTICE MUST BE SENT.] Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:—(1) Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or (2) If he live in one place, and have his place of business in another, notice may be sent to either place; or (3) If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

304. ADDRESS TO WHICH NOTICE SHOULD BE SENT.—As we have said, it is some-

times a safer thing to mail a notice of dishonor to a party secondarily liable than to attempt to deliver it to him personally. In mailing a notice, however, there is sometimes a difficulty in knowing to what address the notice should be sent. It is not a bad plan to get parties to negotiable instruments, indorsers and drawers, if you are not perfectly sure of their addresses, to write them below their signatures on the paper. If that is done then notices sent to these addresses will always be sufficient. If you have no such guide, then you may properly mail a notice to the postoffice where the party to be notified is accustomed to receive his mail or the postoffice nearest to his residence. This postoffice may be at his place of residence or at his place of business. If his place of residence and place of business are in different places, a notice to either is sufficient. If he is temporarily staying in a place, notice may be sent to that place, and presumably it may also be sent to his regular address, even though he is sojourning somewhere else. And finally, if the notice is actually received in time, it does not make any difference how it was received or how it was sent. A case illustrating the difficulties that may arise and the decision of a court on such a question is this: the notary who was to send the notice inquired of several persons as to the indorser's address. The persons to whom he spoke seemed to know about it. They said they thought that a certain town was the nearest town to the farm where the indorser lived.

The letter containing the notice was sent accordingly to that address but that did not happen to be the town where the indorser received his mail, and the indorser did not receive the notice within a reasonable time. Nevertheless, it was held to be sufficient under the terms of the statute.

305. SECTION 109.—[WAIVER OF NOTICE.] Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

306. NOTICE MAY BE WAIVED.—Notice of dishonor may be waived just as presentment may be waived. It may be waived before the dishonor of the instrument or it may be waived afterwards. In the latter case, it is exceptional that liability should be incurred. The waiver after dishonor is in effect a mere promise to pay in spite of not having received notice; that is, the so-called waiver is really a promise without consideration, but, nevertheless, it is binding.

307. SECTION 110.—[WHO IS AFFECTED BY WAIVER.] Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

308. ILLUSTRATIONS OF WAIVER CASES.—Occasionally where the waiver is written in the instrument itself a question arises as to the number of persons to whom it applies. If a waiver is contained in the body of the instrument presum-

ably it applies to all persons who may become secondarily liable. On the other hand, if it is written above the signature of an indorser, it presumably applies to the single indorser only whose name is written underneath. But one might perfectly well write on the back a waiver which would apply to anybody who might indorse, as, for instance, "All indorsers on this instrument waive notice."

309. SECTION 111.—[WAIVER OF PROTEST.] A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of presentment and notice of dishonor.

310. COMMENT ON SECTION 111.—Protest is used with exact propriety only in regard to presentment by a notary and a notice by him embodying a statement of the dishonor of the instrument, but the word is constantly used by bankers and business men as including broadly the necessary formal steps taken by any holder to establish his rights against parties secondarily liable. The statute gives effect to this understanding of business men.

311. SECTION 112.—[WHEN NOTICE IS DISPENSED WITH.] Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

312. COMMENT ON SECTION 112.—Strictly speaking, not presentment or notice but diligence is what the law requires. If, therefore, the holder has

exercised due diligence it makes no difference whether there has in fact been presentment or notice. It must be remembered, however, that the excuses for presentment and for notice are different, and the fact that one is excused does not of itself excuse the other.

313. SECTION 113.—[DELAY IN GIVING NOTICE: HOW EXCUSED.] Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to this default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

314. NOTICE EXCUSED SOMETIMES.—Notice of dishonor is sometimes excused, even though there is no waiver by the party interested. It may be excused temporarily or it may be excused permanently. It is excused temporarily by any circumstance beyond the holder's control and not due to his negligence which makes it impossible to give prompt notice. As soon as the cause for the delay ceases to exist notice must then be given. The commonest illustration of this sort of thing is where the holder is unable, after reasonably diligent inquiry, to determine at once the address of the party to be notified. It may take him some time to find an address. If he is reasonably diligent that delay will be excused, but as soon as he can find the address with reasonable diligence, further delay will not be excused.

315. SECTION 114.—[WHEN NOTICE NEED NOT BE GIVEN TO DRAWER.] Notice of dishonor is not required to be given to the drawer in either of the following cases:—(1) Where the drawer and drawee are the same person. (2) When the drawee is a fictitious person or a person not having capacity to contract. (3) When the drawer is the person to whom the instrument is presented for payment. (4) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument. (5) Where the drawer has countermanded payment.

316. COMMENT ON SECTION 114.—The cases where notice of dishonor is permanently excused may be summed up thus: where the person to be notified had no right to expect that the maker or drawee of the instrument would pay it, he cannot complain if he receives no notice. There are various illustrations of that stated in this section, and subsection 4 would cover any case not specially enumerated in the other subsections. If the drawer and drawee are the same person, obviously the drawer knows when the drawee refuses to pay, therefore the drawer is not entitled to notice. If the drawee is a fictitious person, or one without capacity to contract, the drawer ought to have known that and ought to have expected that the result would be non-payment of the draft, and therefore cannot expect notice. So, also, where the drawer had no right to draw the instrument, as where he had no funds or no arrangement for payment of the draft, or where

he himself had entered into any arrangement with the drawee not to pay the draft, as if he countermanded payment. Similar cases calling for no further comment arise in regard to an indorser, and are covered by the next section. There is also the case of either drawer or indorser being the person who really ought to pay the instrument, the signature of the party primarily liable being merely lent for accommodation. (Sections 114, 115.)

317. SECTION 115.—[WHEN NOTICE NEED NOT BE GIVEN TO INDORSER.] Notice of dishonor is not required to be given to an indorser in either of the following cases:—(1) Where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the instrument. (2) Where the indorser is the person to whom the instrument is presented for payment. (3) Where the instrument was made or accepted for his accommodation.

318. SECTION 116.—[NOTICE OF NON-PAYMENT WHERE ACCEPTANCE REFUSED.] Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

319. COMMENT ON SECTION 116.—Where the instrument has once been dishonored by non-acceptance, the parties secondarily liable are charged, if notice is given. If an acceptance is subsequently taken by the holder, the parties secondarily liable are again freed, but will be once again made liable if

the acceptor fails to pay, and notice is properly given of this failure.

320. SECTION 117.—[EFFECT OF OMISSION TO GIVE NOTICE OF NON-ACCEPTANCE.] An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

NOTE.—In the Wisconsin Act these words are added "but this shall not be construed to revive any liability discharged by such omission."

321. KNOWLEDGE OF DISHONOR FOR NON-ACCEPTANCE.—There is one other circumstance besides the fact that paper is overdue which will prevent a purchaser for value without notice from being a holder in due course; that is, knowledge that a bill of exchange has been dishonored by a refusal to accept. On the continent of Europe a bill of exchange is always presented for acceptance as well as for payment by a notary, and if acceptance or payment is refused the notary marks in ink on the face of the bill that circumstance. Accordingly, anybody can tell, on the continent of Europe, from the face of a bill of exchange, whether it has been dishonored before maturity. But in this country and in England the bill may have been dishonored by refusal to accept, and a right of action may have accrued against the drawer, and yet, maturity not having come, a purchaser may have bought the instrument in good faith. Such a purchaser will be a holder in due course, although if he had notice of the dishonor for non-ac-

ceptance, he would not be a holder in due course, even if he bought before maturity of the bill (see further Section 133), and if a holder in due course he can charge the parties to the bill, even though they have been discharged so far as a prior holder was concerned by his failure to give them due notice of the dishonor for non-acceptance.

322. SECTION 118.—[WHEN PROTEST NEED NOT BE MADE; WHEN MUST BE MADE.] Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

323. IMPORTANCE OF PROTEST.—Protest is the most certain way to prove the facts, showing that secondary parties to a negotiable instrument have been charged; therefore it is frequently desirable even where not legally essential. At common law a protest was required in only one case; that is, on the dishonor of foreign bills. The statute now makes the protest evidence in regard to the dishonor of any negotiable instrument.

Article VIII—Discharge of Negotiable Instruments

324. SECTION 119.—[INSTRUMENT; HOW DISCHARGED.] A negotiable instrument is discharged:—(1) By payment in due course by or on behalf of the principal debtor. (2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

(3) By the intentional cancellation thereof by the holder. (4) By any other act which will discharge a simple contract for the payment of money. (5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

NOTE.—In the Illinois Act subsection (4) is omitted.

325. DISCHARGE OF INSTRUMENT.—The discharge of an instrument is a kind of absolute defence. An instrument is discharged, first, by payment in due course by the principal debtor. "In due course" means at or after maturity. A payment before maturity does not discharge the instrument. That would not be an absolute defence. One who purchased a note before maturity which had in fact been paid could collect again. Even if the payment is made in due course,—that is, at or after maturity,—it must be made by or on behalf of the principal debtor. A payment by an indorser at or after maturity would not discharge the instrument; the maker, of course, would still be liable on it. But the second paragraph of Section 119 provides that payment in due course by a party accommodated would discharge the instrument; that is, if an instrument were made for the accommodation of an indorser, payment by that indorser would totally discharge the instrument.

326. CANCELLATION.—A third method of discharge, enumerated in Section 119, is by the intentional cancellation of the instrument. That may be regarded as the normal way of discharging a

negotiable instrument. A negotiable instrument is looked on as a formal thing which exists as an obligation normally as long as it exists uncancelled. Destroying the instrument is destroying the obligation, so that either tearing or punching holes in or otherwise cancelling an instrument is the appropriate way of discharging it, and will discharge it even if it is done before maturity. A question has arisen as to the effect of an intended cancellation before maturity, which was not done so effectively as to be ineradicable. There were certain notes of the District of Columbia which were taken up before maturity and stamped as paid with a rubber stamp, but they were not punched or the paper otherwise destroyed or mutilated. Somebody got hold of them, washed off the marks of the rubber stamp and negotiated them again before maturity. The Supreme Court of the United States held that the notes had been effectively cancelled and could not be enforced, even by a holder in due course. The court, we think, regarded the cancellation as on the whole not negligently done. It would seem to us as if a holder in due course ought to be able to collect on such an instrument if the cancellation were really done so carelessly as to invite alteration by rubbing out the marks of cancellation. To be effectual, cancellation must be intentional. Strictly at common law even unintentional cancellation destroyed the obligation, because the obligation was regarded as identical with the instrument and not

able to survive its destruction or mutilation; but courts of equity first compelled the issue of a new instrument when the original was cancelled accidentally, or lost or destroyed accidentally, and now even in a court of common law such an instrument cancelled by mistake or lost or destroyed would still be regarded as imposing an obligation on the parties to it.

327. ACTS WHICH WOULD DISCHARGE A SIMPLE CONTRACT.—The fourth method of discharge enumerated in Section 119 is by any other act which will discharge a simple contract for the payment of money. That is simply a blunder of the statute. Among amendments in the statute which have been proposed is the repeal of this fourth method of discharge. It is a blunder for this reason: in a non-negotiable contract, that is in a simple contract, for the payment of money, any agreement between creditor and debtor for the discharge of the debt, if made for good consideration, will discharge it. Thus, if the creditor agrees to take a horse in payment of a debt of $100 and the debtor gives the horse, the debt is discharged. But suppose the case of negotiable note for the payment of money and an agreement before maturity by the payee to take a horse in full satisfaction, and that horse given, that would not discharge the note. An indorsee of the note before maturity, who took the instrument in ignorance of the settlement and paid value, would be able to enforce it under the law, as

it was before the Negotiable Instruments Law was enacted, and it is hard to believe that the statute can have intended to change in so essential a matter the law of negotiable paper as to alter that rule.

328. THE HOLDER AT MATURITY THE PRINCIPAL DEBTOR.—A final method of discharge is stated in the same section of the Act, that is, when the principal debtor becomes the holder at or after maturity in his own right. You will see the reason for such a rule. If the maker of a note is the owner of it at maturity, then the duty to pay and the duty to receive payment are united in the same person and they cancel each other. But the maker must be the holder at maturity in his own right. That means if he were the holder as executor or as trustee, while his obligation as maker was his individual personal obligation, the instrument would not be discharged.

329. SECTION 120.—[WHEN PERSONS SECONDARILY LIABLE ON, DISCHARGED.] A person secondarily liable on the instrument is discharged:—(1) By any act which discharges the instrument. (2) By the intentional cancellation of his signature by the holder. (3) By the discharge of a prior party. (4) By a valid tender of payment made by a prior party. (5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved. (6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instru-

ment, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

NOTE.—In the Illinois Act subsection (3) reads: "(3) By a valid tender of payment made by a prior party." To subsection 5 there is added "or unless the principal debtor be an accommodating party." Subsection (6) is amended to read as follows: "By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent, prior or subsequent, of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party." In the Missouri Act there is added to subsection (3) "except when such discharge is had in bankruptcy proceedings." In the Wisconsin Act there is inserted a new subsection: (4a) By giving up or applying to other purposes collateral security applicable to the debt, or, there being in the holder's hands or within his control the means of complete or partial satisfaction, the same are applied to other purposes." The words "prior or subsequent" are inserted after "assent" in subsection (6) and the words "or unless he is fully indemnified" are added to the subsection. In the Maryland and New York Acts the words "unless made with the assent of the party secondarily liable, or" in subsection (6) are omitted.

330. DISCHARGE OF SINGLE OBLIGATIONS ON AN INSTRUMENT.—An instrument may be discharged as to one party without being discharged altogether, and Section [redacted] provides for a case which not infrequently happens in suits or negotiable instruments. When a man sues on a negotiable instrument he must trace his title from the payee, if it is payable to order, until his own title accrues. Now if there are a series of special indorsments, the holder must prove every one of them,—prove that they were made by the person

who purported to make them; but if there is a blank indorsement the holder may fill in his name there, and frequently, where there is a special indorsement subsequent to a blank indorsement, the holder will cross out the special indorsement so as to leave the blank indorsement as the last one; then he can fill in his own name in the blank. But if he does that the indorser whose name is struck out is discharged; it is a cancellation of his obligation. Accordingly, one wants to be sure before striking out an indorsement in this way that the other parties are sufficiently responsible to make the collection of the instrument certain.

331. DISCHARGE OF JOINT DEBTOR OR SURETY.—We now come to a rather troublesome matter of personal defences which must be understood in order to comprehend subsections 5 and 6 of this section. It presents this question. How far does a discharge or dealing with one party to a negotiable instrument affect the holder's rights against other parties to the instrument? And there are two situations where this question becomes especially important: one, where there are joint obligors, either as makers or as indorsers, and second, where there are parties bearing the relation to one another of principal debtor and surety.

332. RELEASE OF ONE JOINT DEBTOR RELEASES ALL.—A joint debtor stands in rather a technical relation to his creditor, and it was a rule of the common law that a release of one joint

debtor released all. As they could no longer, after the release of one, be all bound jointly, and as that was the only relation entered into by them, if one was out all in effect were freed. Similarly a judgment against one joint debtor discharged all. Accord and satisfaction with one discharged all.

333. COVENANTS NOT TO SUE.—A covenant not to sue one, however, did not discharge all. A covenant not to sue any debtor is merely a contract with the covenantee that he shall not be sued. The covenantor, the maker of the obligation, therefore, though he would make himself liable in damages, might break his contract not to sue and nevertheless sue. So the result is if a creditor gives a joint debtor a covenant never to sue him, the creditor may nevertheless sue him together with the other joint debtors (and the creditor would have to sue all of them at once in order to recover), and it would be no defence that he had covenanted not to sue. The suing creditor could say, "Yes, I promised not to sue and I am breaking my promise, but if that results in any damage to you, you can sue me for breaking my covenant." It might cause some damage to the covenantee, but it might not cause any substantial damage. The creditor of joint debtors, though he gets, if he succeeds in his action, a joint judgment against them all, may levy execution on the property of any of the debtors. He does not have to get it equally from all. He can go wholly against one, and the joint debtors will have

to settle up between themselves as to what each ought to pay. Accordingly, if the creditor gets a joint judgment against his joint debtors after he has given one of them a covenant not to sue him, no damage substantially will be caused to that covenantee if the creditor levies execution wholly against the other debtor. This, then, is a summary of the situation as to joint debtors. The holder must not release one of them or make accord and satisfaction, but he may, without destroying his right of recovery against the rest, covenant not to sue one. The real effect of that would be better expressed by calling it a covenant not to levy execution on any judgment against the covenantee, for that is in substance what it amounts to.

334. DISCHARGE OF SURETY BY DEALING WITH PRINCIPAL.—Now let us take the more troublesome case of the principal debtor and surety. It is a rule of the law, applicable not simply to negotiable paper, but to contracts generally, that a surety may be discharged by several kinds of dealing with the principal debtor. The surety will be discharged, first, by any release of the principal debtor; second, by any change in the nature of the obligation made by agreement with the principal debtor; and third, by any dealing with the collateral put up by the principal debtor in a way not warranted by the original agreement, (even though the principal debtor after the original agreement may have authorized this dealing with the collateral),

or by the refusal to accept a tender of payment by the principal debtor. The reason why the surety is discharged in all these cases is broadly that he has agreed to go security for an obligation on certain terms, and it is not fair to him to try to hold him as security when the situation has changed. Of course it has changed materially if the principal debtor is released, and the obligation would be thrown wholly on the surety. It is less obvious, perhaps, but still clear, that it is unfair to the surety if any agreement is made with the principal debtor whereby the terms of the obligation are otherwise altered.

335. GIVING TIME TO THE PRINCIPAL.— The commonest kind of alteration of the terms of the obligation of the principal debtor is by what is called giving him time; that is, extending the time of his obligation. Suppose a maker of a note is the principal debtor and an indorser is surety. The note is due on February 1. A contract is made with the maker that he shall have until February 15 to pay that note. That will discharge the indorser. This does not rest on any principle of negotiable paper. It would be the same if instead of a note we had said a bond with a surety, maturing at a certain time, and an agreement was made with the principal debtor to extend the bond for a month. But now in order that this giving of time or any other change in the obligation shall have the effect of which we speak, it is essential that the agreement to

give time or to make any other change shall be binding. It must be a binding contract with the principal debtor. If the holder of the note of which we have spoken should merely say to the maker, "You may have until the 15th of February; until then we shall not press you," that would not discharge the indorser, providing that presentment had been made at maturity and notice given according to the rules of negotiable paper. In the case as we have last put it the creditor has made no binding contract to hold the obligation open until February 15. The creditor has promised to do so, but there has been no consideration for that promise. If, however, the parties made a bargain by which the maker agreed to pay the interest until February 15 in return for promise by the holder not to enforce the note until that date, then you would have a binding contract and the surety would be discharged. It follows, of course, that any covenant not to sue the principal debtor discharges the surety; since a covenant is under seal and binding without consideration.

336. DEALING WITH COLLATERAL.—The third way of discharging a surety that we spoke of, by dealing with collateral, not infrequently arises in dealings with banks. Collateral is put up for an indorsed note, and the maker wants to make a substitution of collateral and is allowed to do so by the bank. Unless there was something in the terms of the original bargain to which the surety was a party

which allowed that substitution of collateral, the bank will lose its right against the indorser if it permits the substitution of collateral without the indorser's assent. You will readily see the reason of this when your attention is called to the fact that the surety—the indorser—is as much interested in the sufficiency of the collateral as the bank is. If the collateral is insufficient the surety will have to answer for the consequences. Accordingly, the surety has a right to be consulted if there is any question of substituting different collateral from that which was originally put up with the note. Even more clearly if the principal debtor tenders payment and the creditor refuses to accept it he cannot thereafter hold the surety.

337. DIFFERENT WAYS IN WHICH SURETIES ARE LIABLE.—Now sureties may be liable, either jointly with the principal debtor, or jointly and severally, or severally. Moreover, the surety may or may not be evidently such by the terms of the instrument. On a promissory note with indorsements the maker is at least apparently the principal debtor and as to him the indorsers are sureties. Moreover a party may be a principal debtor with reference to one party, and a surety with reference to another. Thus the first indorser is a principal with reference to the second indorser, but a surety with reference to the maker. But where signatures are for accommodation, it may happen that one who seems to be the principal debtor is

really only a surety, or the principal debtor and surety may promise jointly. One of the joint makers of a note may be a surety. If he is, sometimes the note says so; sometimes it does not. If the surety and principal debtor are joint obligors you have to look out both for the difficulties previously referred to as inherent in the situation of joint debtors, and also for the difficulties always inherent in the relation of principal and surety. These two things must be separately looked out for.

338. EXPRESS RESERVATION OF RIGHTS.—There is one qualification, however, in regard to what we have said about the effect of a release, either of a joint debtor or of a surety. It is held that by express reservation of the creditor's right against a surety, or against a joint debtor who is not a surety, the creditor may retain his rights. In effect the instrument though called a release with reservation of rights is treated by the law as though it were merely a covenant not to levy execution on the discharged debtor. Let us see how this works out. If a creditor releases a joint debtor who, we will suppose, is also the principal debtor, with reservation of rights against the surety, the creditor must sue both parties if he wants to collect against anybody, but then he will levy execution against the surety. The surety will then sue the principal debtor for indemnification,—for a principal debtor is always bound to indemnify a surety who has been compelled to pay,—and the principal debtor will

thus eventually have to pay the debt. The principal debtor cannot in turn sue the creditor, because the creditor by reserving rights against the surety had bargained for the right to collect from him even if the consequence of so doing involved loss to the principal debtor. The result is that a release with reservation of rights given to a principal debtor does not do him any ultimate good. It saves him from having his property directly seized by his creditor, but as soon as the surety is forced to pay, that surety will then sue the released principal debtor and collect from him. As a practical matter the moral is: if you are releasing any party to a negotiable instrument, or, indeed, to any contract, always insert a reservation of rights against all other parties if you don't mean to discharge the whole instrument. If one simply follows this rule in every case it will be unnecessary to think out in just what cases the release might be fatal and in what case it might not be. Always add, "Reserving, however, all my rights against other parties to the instrument."

339. CONCEALED SURETYSHIP RELATION.—Now as we have said, the suretyship relation may appear on the face of things or it may not. On the face of a note made by A and indorsed by B, A appears to be the party who is the principal debtor and B appears to be the party who is the surety, but that is not necessarily the fact. That note may have been made by A for the accommoda-

tion of B. In that case B is really as between the parties the principal debtor, and A, the maker of the note, is the surety.

340. GIVING TIME TO SURETY WHO DOES NOT APPEAR TO BE SUCH.—Now what is the effect of a contract by a payee, the holder of the note, to give time to A? Giving time to a surety does not discharge a principal debtor, and if A is in fact the surety, B, the principal debtor, cannot complain if time is given to A. But suppose the holder of the instrument, being ignorant that A was an accommodation maker, and therefore was really a surety, gave time or a covenant not to sue to B, the indorser, is A discharged? Can A say to the payee who is holder, "You have given time to B, the indorser, and as he was really the principal debtor, you have changed the form of the obligation; and as I am really a surety, though I seem to be the principal debtor (as I am the maker of the note), I am discharged." Prior to the passage of the Negotiable Instruments Law the answer to that question depended on this: did the payee or holder actually know when he gave time to B, the indorser, that A was really a surety for B and that B was the principal debtor? If at any time before making the contract of indulgence the holder knew that B was really the principal debtor, then an agreement for time made with B would discharge the surety, A, the maker of the note. In other words, the holder had to respect the suretyship relation between the

parties as soon as he had notice of it, even though he did not know of it at the time he became holder but found it out afterwards.

341. EFFECT OF NEGOTIABLE INSTRUMENTS LAW.—Now it has been a disputed question under the Negotiable Instruments Law whether that law has changed this rule, but the view adopted by most States which have had the question before them is that the Negotiable Instruments Law changed the rule of the common law; that the language of Section 120, which is the section involved, is such as to indicate that the Legislature intended the holder should only be bound to consider who was primarily liable on the instrument, and need take no notice of a suretyship relation not apparent on the face of the instrument. It still remains law, as it was before the Negotiable Instruments Law, that to give time to a principal debtor, who is prior on the instrument to the surety, will discharge the surety; but it is probably not true under the Negotiable Instruments Law, that finding out afterwards that the party subsequent on the instrument is really the principal debtor compels the holder to treat him as such. In any State where the matter has not yet been decided, however, the only safe way would be to assume that the rule of the Common Law might still prevail and treat one who was discovered to be a surety in the same way whether or not he appeared by the instrument to be such.

342. SECTION 121.—[RIGHT OF PARTY WHO DISCHARGES INSTRUMENT.] Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:—(1) Where it is payable to the order of a third person, and has been paid by the drawer; and (2) Where it was made or accepted for accommodation, and has been paid by the party accommodated.

343. COMMENT ON SECTION 121.—This section only becomes important where the party secondarily liable derives title through the prior parties whom he is endeavoring to hold liable. If, when he is remitted to his original position, he could not hold any prior party liable on the instrument, it is in effect totally discharged.

344. SECTION 122.—[RENUNCIATION BY HOLDER.] The holder may expressly renounce his rights against any party to the instrument, before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

345. COMMENT ON SECTION 122.—Renunciation is an exceptional kind of personal defence that is not allowed in contracts generally but only

in regard to negotiable instruments. A holder of a negotiable instrument may by simply writing to the maker that he renounces his rights on the note discharge the maker so far as this holder personally is concerned. The maker will not have an absolute defence against a subsequent holder in due course, but he will have a personal defence against the holder who has thus renounced his rights. This is entirely different from the law governing a simple contract. If a creditor on a simple contract agrees to renounce his rights for any sum less than the face of a liquidated debt, the renunciation or the agreed surrender of the creditor's rights amounts to nothing. The payment of part of the debt is not sufficient consideration for the agreement to surrender the whole debt. Still more plainly is it true that the creditor cannot renounce his claim altogether without getting any payment. There would be no consideration for such an agreement on the part of the creditor. But in the case of a negotiable note we have just that possibility. The holder may, without getting any consideration, renounce his rights against the party who really ought to pay the note, that is, the maker unless he made the note for the accommodation of an indorser. In order to be effective the renunciation must be in writing.

346. SECTION 123.—[CANCELLATION; UNINTENTIONAL; BURDEN OF PROOF.] A cancellation made unintentionally, or under a mistake or without the authority of the holder, is

inoperative; but where an instrument or any signature thereon appears to have been cancelled the burder of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

347. COMMENT ON SECTION 123.—The principle involved in this section is the general one that loss or destruction by accident of a negotiable instrument (or any other paper) is not allowed to destroy the rights of the owner of the document.

348. SECTION 124.—[ALTERATION OF INSTRUMENT; EFFECT OF.] Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

NOTE.—In the Illinois Act the words "fraudulently or" (probably "and" was intended) are inserted before "materially" in line one and the words "by the holder" after "altered" in the same sentence. In the Illinois Act the words "fraudulently or" (probably "and" was intended) are inserted before "materially" in line one and the words "by the holder" after "altered" in the same sentence.

349. GENERAL RULE AS TO ALTERATION.—An absolute defence is created by alteration, with which Sections 124 and 125 of the statute deal. Before the statute was passed there were two important things to consider: first, was an alteration material, and second, was it fraudulently made by

the holder. If an alteration was immaterial it would not have any effect whatever. It therefore became important to decide what was a material alteration. Indeed, it is still, and the statute in Section 125 states some of the principal alterations which are held material. Many of them, you will readily see, must be material, as, for instance, alteration of the amount, the time or place of payment, the parties, or the medium of payment, but the date has also been held material, and it has even been held in England that the number of a note is material, and that a change in that creates a material alteration. Prior to the statute, if an alteration was material the next questions were, was it fraudulent and was it made by the holder? If it was not made by the holder, or if, though made by the holder, he made it believing that he was really making the instrument express the agreement of the parties,—as, for instance, if he added to it "with interest at 5 per cent.," thinking to himself "that was what we agreed,"—such a change prior to the statute would not destroy the instrument. The alterations themselves if not assented to by the parties to be charged would not bind them. The altered instrument would only be effective as if still in its original form, but it would remain a valid instrument just as if it had remained unaltered. To some extent the Negotiable Instruments Law has changed that and substituted a harsher rule. Section 124 provides that "where a negotiable instrument is materially altered

without the assent of all parties liable thereon it is void, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers." If the section stopped there, any material alteration, however innocent, would make the instrument void, even in the hands of a holder in due course, as would all fraudulent material alterations. Section 124, however, further provides: "but when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to the original tenor." It may seem that this would avoid all difficulties, but consider this case: a note is made payable to A; he, without fraud and thinking it was what the parties agreed, adds the words "with interest at 5 per cent." He does not negotiate the instrument, but holds it till maturity. It would seem that the instrument is absolutely void. The second sentence does not apply, since the instrument has not been negotiated to a holder in due course, and the first sentence of the section says that the altered instrument shall be void. One may suppose a still harsher case: suppose an instrument is altered by a third person not the holder (that sort of case has not infrequently arisen), and suppose as before that there is no negotiation of the instrument prior to maturity. It seems under the wording of this statute that that instrument also is void. In other words, the holder of an instrument must at his peril keep it free from

material alterations not only by himself but by anybody else, and if it once gets altered the only safe thing to do is to sell it as quickly as he can before maturity to a holder in due course. If he does that the holder in due course will be able to recover on the instrument according to its original tenor, but if the instrument is held until after maturity, then there cannot be a holder in due course, since a purchaser after maturity is not so designated, and the original holder himself cannot recover.

350. RAISED CHECKS.—Perhaps the commonest kind of alteration in bank business is a raised check. If a check is raised and paid by a bank, the bank can recover the excess payment over and above the original amount of the check from the person to whom payment was made. The bank will not be able to charge its customer the full amount which it has paid, since the customer never authorized payment of the larger amount; so it is essential for the bank's protection that it should recover from the person to whom it made payment in excess. Sometimes it can get at this person, but, of course, not infrequently the person to whom payment is made is a rascal and makes good his escape, or else is irresponsible when caught; then the bank would like very much to charge up the full payment to its customer, and though it cannot generally do that, there is one case where it has been urged that the bank ought to be able to do it. These are the facts of a leading case in England: a man

was going away from home and he left with his wife a number of signed blank checks. She filled in the amount of one of these very carelessly, so that it was perfectly easy for a fraudulent holder of the check to add other words and figures and so raise the check; and the bank, having paid it, claimed the right to charge up against its customer the full amount of the raised check because his carelessness had made possible the loss. The bank was in that case given the right to do so, and it seems to us that that decision is right. It has, however, been overruled in England and in many States of this country is not law. Apparently, in many, if not most States, if we draw a check for $5 and write the word "five" clear over at the right-hand side of the line, close up against the word "dollars," and also write the figure "5" out at some distance to the right of the dollar mark, so that it is perfectly easy for any one to write "one hundred" in front of the word "five" and insert two figures before the figure "5," still, our bank would not be able to charge that check as $105 against us, though it was deceived into paying that amount. We think that is wrong, but, as we say, we understand it to be the law in many States. The reason given in the cases for that rule is that one is not bound to anticipate crime. With all respect to the law, it seems that is a silly thing to say. A person who draws a check in the way which we have suggested ought to anticipate crime. Why is it that banks and other persons who

draw large checks commonly adopt stamping devices of one sort or another to fix the amount? It is just because they anticipate the possibility of crime. It seems to us it may be as negligent not to anticipate crime if the door is left wide open for it as not to anticipate any other sort of happening which is likely to follow from careless conduct. But we rather wonder, in view of the law, in such States, that drawers of checks are as careful as they are, for apparently the burden is thrown wholly on the bank, and the drawer is allowed to be careless. Whether there is not some limit to the degree of carelessness which a drawer may exercise we should be interested to have decided. We should like a case to come up where the drawer had been guilty of the most extreme carelessness. We should be interested in seeing whether any court would follow out in such an extreme case the principles that have here been criticised.

351. SECTION 125.—[WHAT CONSTITUTES A MATERIAL ALTERATION.] Any alteration which changes,—(1) The date; (2) The sum payable, either for principal or interest; (3) The time or place of payment; (4) The number or the relations of the parties; (5) The medium or currency in which payment is to be made; Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

352. COMMENT ON SECTION 125.—The

cases stated in the sub-sections of this section are necessarily illustrative. The general principle is stated in the last line and a half of the section. Other illustrations of material alteration are the erasure of the name of an obligor, the insertion of a waiver of demand and notice, the addition or erasure of a seal in a jurisdiction where seals alter the legal effect of an instrument as by allowing a longer statute of limitation. An alteration is none the less material because the change is advantageous to the obligor. To insert a later day of payment, a lower rate of interest, a smaller amount is material. The addition of a collateral guaranty is not material for it does not affect the liability of the principal debtor. The addition, however, of another name as a joint obligor to that of a maker or indorser is material since it purports to make the liability joint instead of several. Correcting a mistake in spelling or in the initials of a name, or inserting a description of security given for the note, is not material.

CHAPTER III

Title II of the Negotiable Instruments Law

BILLS OF EXCHANGE

Article I.—Form and Interpretation

353. SECTION 126.—[BILL OF EXCHANGE DEFINED.] A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer.

354. COMMENT ON SECTION 126.—The formal requirements of negotiable paper applicable to bills of exchange have been considered in detail in connection with earlier sections of the Act.

355. SECTION 127.—[BILL NOT AN ASSIGNMENT OF FUNDS IN HANDS OF DRAWEE.] A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.

356. COMMENT ON SECTION 127.—The fact that a bill must order the drawee to pay unconditionally, of itself indicates that it is not an assignment of a particular fund; if it were it would violate a fundamental principle of the law of negotiable

paper requiring an unconditional order, for that means an order to pay irrespective of the existence of any fund.

357. SECTION 128.—[BILL ADDRESSED TO MORE THAN ONE DRAWEE.] A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

358. REASON FOR LIMITING THE NUMBER OF DRAWEES.—The reason for not allowing several persons to be drawees in the alternative or in succession is because the multiplication of presentments necessary in order to charge the parties secondarily liable would work practical inconvenience. It is true that somewhat similar inconvenience may be caused by drawing on a number of persons jointly, especially if they are not partners, since in that case presentment must be made to each of them, but the allowance of such a bill seems unavoidable.

359. SECTION 129.—[INLAND AND FOREIGN BILLS OF EXCHANGE.] An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this State. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

360. IMPORTANCE OF DISTINCTION BETWEEN INLAND AND FOREIGN BILLS.—There are two reasons for distinguishing between inland and foreign bills; the most important reason

is that foreign bills must be protested by a notary, whereas no formal protest is necessary in regard to inland bills; the other reason relates to a subject called the conflict of laws. If the law of the jurisdiction where a bill is drawn differs from the law of the jurisdiction where it is payable, it is necessary to decide which law governs the case. In general the law of the place where the bill is drawn governs the nature and character of the obligations assumed by the parties; but the law of the place where it is payable governs the formalities of presentment, protest, and the necessary diligence to charge persons secondarily liable.

361. SECTION 130.—[WHEN BILL MAY BE TREATED AS PROMISSORY NOTE.] Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or a promissory note.

362. COMMENT ON SECTION 130.—The reason for the rule stated in this section is that in the cases supposed, the drawer in legal effect is absolutely bound to pay, whereas the drawer of an ordinary bill of exchange is only bound to pay on condition that some one else fails to pay on presentment at maturity.

363. SECTION 131.—[REFEREE IN CASE OF NEED.] The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say

in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may see fit.

364. COMMENT ON SECTION 131.—The practice alluded to in this section is probably not common.

Article II.—Acceptance

365. SECTION 132.—[ACCEPTANCE; HOW MADE, ET CETERA.] The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

366. SECTION 133.—[HOLDER ENTITLED TO ACCEPTANCE ON FACE OF BILL.] The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill and, if such request is refused, may treat the bill as dishonored.

367. RIGHTS OF HOLDER IN ACCEPTANCE.—Though (as indicated by the two following sections) an acceptance may be valid though not written on the face of the bill, the holder of the instrument may require that it shall be so written, and, if this request is refused, may treat the bill as dishonored. It is important for a holder to exercise this right and not to rest satisfied with an acceptance which is not written on the bill.

368. SECTION 134.—[ACCEPTANCE BY SEPARATE INSTRUMENT.] Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value.

369. WHAT IS AN ACCEPTANCE IN WRITING?—It is to be observed that though an acceptance not written on the bill is in some cases a valid acceptance, it must be in writing. What is such a promise in writing as to amount to an acceptance may give rise to question; especially whether a telegraphic promise is an acceptance in writing. The promisor ordinarily writes the message but delivers this writing to the telegraph company, which gives another writing to the promisee. It is probable that this is sufficient to satisfy the statute; but a promise over the telephone is insufficient; the common practice of inquiring over the telephone whether a draft or check will be paid is frequently convenient, but it must be remembered that the practice is not protected by the Negotiable Instrument Law, and a promise so made is not an acceptance within the meaning of the Statute, though under some circumstances it may amount to a simple contract.

370. SECTION 135.—[PROMISE TO ACCEPT; WHEN EQUIVALENT TO ACCEPTANCE.] An unconditional promise in writing to accept a bill before it is drawn is deemed an actual

acceptance in favor of every person who upon the faith thereof, receives the bill for value.

371. COMMENT ON SECTION 135.—The rule stated in this section was established in the United States as matter of common law prior to the passage of the Negotiable Instruments Law. It is nevertheless contrary to the custom of merchants which requires the obligations of negotiable paper to be written on the paper itself, and is opposed to the English law. Such a right as is here alluded to would seem on principle to constitute at most a simple contract. The law, however, is settled in the United States by the statute that such a promise becomes negotiable when the bill is drawn and is treated as if it were part of the bill.

372. SECTION 136.—[TIME ALLOWED TO DRAWEE TO ACCEPT.] The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill; but the acceptance if given, dates as of the day of presentation.

373. COMMENT ON SECTION 136.—The time thus allowed the drawee is presumably a privilege allowed him which he need not necessarily take; that is, if he should refuse to accept at the beginning of the twenty-four hours, the instrument is immediately dishonored; the holder need not wait the remainder of the period to see if the drawee will change his mind.

374. SECTION 137.—[LIABILITY OF DRAWEE RETAINING OR DESTROYING

BILL.] Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

NOTE.—This section is omitted in Illinois and South Dakota.

375. ACCEPTANCE BY RETAINING THE BILL.—The case referred to in this section might be properly treated as a case of dishonor for non-acceptance, rather than as a case of acceptance. Suppose the acceptor takes twenty-four hours, or takes the matter under consideration, as the preceding section permits, it is provided that his failure to return the instrument, either with or without his acceptance, at the expiration of the twenty-four hours amounts to an acceptance. It would seem that it rather amounts to a wrongful confiscation of another person's property, but the statute says that it is an acceptance. That means that there must be a demand at maturity for payment of the instrument, in order to charge the drawer or indorsers. This is a section of the statute to which an amendment has been proposed. It would seem reasonable that when a drawee thus retains a bill of exchange and refuses to give it back, to treat the bill as dishonored rather than accepted, for the drawer ought to be notified of the situation. Of course, the case is one that does not very often occur.

376. SECTION 138.—[ACCEPTANCE OF INCOMPLETE BILL.] A bill may be acepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment.

377. COMMENT ON SECTION 138.—In connection with this section must be borne in mind the rules previously considered in regard to filling blanks in an incomplete instrument. The second sentence in Section 138 expresses an obvious truth. An immediate right of action arises on the original dishonor by non-acceptance; and thereafter the drawee has no right to accept at all unless the holder allows him to. Accordingly the holder may insist on any terms he sees fit as a condition of permitting the drawee to accept subsequently. In connection with this point Section 150 must be borne in mind also. The drawer and any indorsers will be discharged unless the holder treats the instrument as dishonored by the original non-acceptance.

378. SECTION 139.—[KINDS OF ACCEPTANCES.] An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

379. COMMENT ON SECTION 139.—Strictly speaking a qualified acceptance is no acceptance at all. It is a refusal to accept though unaccompanied by a promise to do something different from that which the drawer ordered.

380. SECTION 140.—[WHAT CONSTITUTES A GENERAL ACCEPTANCE.] An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere.

381. COMMENT ON SECTION 140.—Suppose such an acceptance as is referred to in this section, must the holder present the instrument at the place named in the acceptance, or at the place where the instrument is due according to the tenor of the face of the instrument. Unless the acceptance expressly states that the bill is to be paid only in the place named in the acceptance, presentment must be in the place indicated by the drawing. The acceptor himself could not object to presentment at the place named by him, but parties secondarily liable could assert that the bill was not dishonored unless presented at the place where the drawer ordered payment to be made. The effect of the section is that a place inserted in the acceptance is regarded as merely permissive so far as the acceptor is concerned. If the words were construed as meaning more than this, the acceptance would be a qualified one and therefore a dishonor of the instrument.

382. SECTION 141.—[QUALIFIED ACCEPTANCE.] An acceptance is qualified, which is:—(1) Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated. (2) Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn. (3) Local, that is to say, an acceptance to pay only at a particular place. (4) Qualified as to time. (5) The acceptance of some one or more of the drawees, but not of all.

383. SECTION 142.—[RIGHTS OF PARTIES AS TO QUALIFIED ACCEPTANCE.] A qualified acceptance since it involves a refusal to honor the bill according to its tenor is a dishonor of the bill. Therefore, the holder may refuse to take such an acceptance, and if he does not obtain an unqualified acceptance, may treat the bill as dishonored by non-acceptance, with the ordinary consequences. Therefore, also, where a qualified acceptance is taken the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. But when the drawer or an indorser receives notice of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto.

Article III.—Presentment for Acceptance

384. SECTION 143.—[WHEN PRESENTMENT FOR ACCEPTANCE MUST BE MADE.] Presentment for acceptance must be made:—(1) Where the bill is payable after sight, or in any other

case, where presentment for acceptance is necessary in order to fix the maturity of the instrument; or (2) Where the bill expressly stipulates that it shall be presented for acceptance; or (3) Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

385. NECESSITY OF PRESENTMENT FOR ACCEPTANCE.—Presentment is of two sorts: presentment for acceptance and presentment for payment. Presentment for acceptance is only appropriate for bills of exchange and is not generally necessary, though the holder of a time bill is entitled to demand that acceptance be made in writing on the bill and signed. In some specific cases provided for in this section, presentment for acceptance must be made. The only one of these cases where you might not know without being told that the rule was so is the last named, requiring that where the bill is payable elsewhere than at the residence or place of business of the drawee. If a bill does not require presentment for acceptance the holder may do just as he chooses about it. If he does present the bill for acceptance and it is dishonored, he must give notice of dishonor in the same way as if it had been presented for payment and dishonored, in order to hold the indorsers. He cannot charge the indorsers, if he has so presented it for acceptance and it has been dishonored, by holding it until maturity

and presenting it again, and on refusal by the payee giving prompt notice to the drawer and indorsers. (Section 150.) Nevertheless, a holder in due course of such an instrument can charge the drawer and indorsers, although the instrument had been dishonored for non-acceptance before this holder took the instrument, and though the drawer and indorsers had no notice of the dishonor.

386. SECTION 144.—[WHEN FAILURE TO PRESENT RELEASES DRAWER AND INDORSER.] Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

387. TIME OF PRESENTMENT FOR ACCEPTANCE.—If the bill is of a sort which requires presentment for acceptance, the holder must either negotiate it within a reasonable time or he must present it for acceptance within a reasonable time. Suppose the case of a bill payable somewhere else than at the residence or place of business of the drawee and payable in three months. The holder must promptly present it for acceptance or negotiate it. Suppose that he does present it within a reasonable time and acceptance is refused. Thereafter, having waited more than a reasonable time, suppose that he negotiates it for value to a purchaser who knows nothing of the prior presentment. Probably that purchaser would not be protected,

and could not sue the drawer and indorsers because he would have notice from the form of the instrument that there must either have been presentment and dishonor or that the holder has carelessly failed to make presentment within the proper time for acceptance. If presentment for acceptance is made of bills as to which it is not required by the statute, it may be made at any time the holder likes before maturity.

388. SECTION 145.[PRESENTMENT; HOW MADE.] Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and: (1) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only. (2) Where the drawee is dead, presentment may be made to his personal representative. (3) Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

389. WHEN PRESENTMENT MUST BE MADE.—It must be made at a reasonable time of any business day, but one may hold a bill thinking he will not present it for acceptance, and finally change his mind and present it for acceptance shortly before maturity. It may be presented on Saturday prior to 12 o'clock.

390. TO WHOM PRESENTMENT FOR ACCEPTANCE MUST BE MADE.—If the instrument is addressed to more than one drawee it must be presented to all of them unless they are partners. If the drawee of a bill is dead, presentment must be made to his personal representatives. If he has been adjudicated a bankrupt it must be presented either to him or to his trustees in bankruptcy.

391. SECTION 146.—[ON WHAT DAYS PRESENTMENT MAY BE MADE.] A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock, noon, on that day.

NOTE.—The last sentence is omitted in Kentucky and Wisconsin.

392. SECTION 147.—[PRESENTMENT WHERE TIME IS INSUFFICIENT.] Where the holder of a bill drawn payable elsewhere than at the place of business or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

393. COMMENT ON SECTION 147.—Here again we see that what the law requires is reasonable diligence, not any particular result, in order to charge parties secondarily liable.

394. SECTION 148.—[WHERE PRESENTMENT IS EXCUSED.] Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:—(1) Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill. (2) Where, after the exercise of reasonable diligence, presentment cannot be made. (3) Where, although presentment has been irregular, acceptance has been refused on some other ground.

395. COMMENT ON SECTION 148.—Subsection 2 in this section covers all cases except that in subsection 3. The principle expressed in the latter subsection is of general application in the law of contracts. Where a party to a contract repudiates his obligation, it is unnecessary to comply with the conditions which qualify his obligation. The law does not compel a man to do useless things, and if a party to a negotiable instrument or to any contract announces that he is not going to perform his duty, the required performance from the other side is excused.

396. SECTION 149.—[WHEN DISHONORED BY NON-ACCEPTANCE.] A bill is dishonored by non-acceptance:—(1) When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or (2) When presentment for acceptance is excused and the bill is not accepted.

397. SECTION 150.—[DUTY OF HOLDER WHERE BILL NOT ACCEPTED.] Where a bill

is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers.

398. COMMENT ON SECTION 150.—Though a holder, as provided in this section, must give prompt notice of dishonor by non-acceptance, or he will discharge the drawer and indorser, a holder in due course may (being ignorant of the non-acceptance and taking before maturity) present the bill for payment, and on dishonor for nonpayment charge the drawer and indorsers. This is impossible if any notation on the bill itself indicates its dishonor for non-acceptance, since any one who took such an instrument would be chargeable with notice of what appeared on its face.

399. SECTION 151.—[RIGHTS OF HOLDER WHERE BILL NOT ACCEPTED.] When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary.

400. DAMAGES ON DISHONOR FOR NON-ACCEPTANCE.—When there is dishonor for non-acceptance and notice thereof is duly given to the drawer and indorsers, there is an immediate right against them to recover the full amount of the bill. In the case of a non-interest bearing bill it is a clear profit to the holder to have the bill dishonored for non-acceptance rather than for non-pay-

ment. There is no discount of interest for the period between the day of maturity and the day when presentment for acceptance was made.

Article IV—Protest

401. SECTION 152.—[In WHAT CASES PROTEST NECESSARY.] Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary.

402. PURPOSE OF PROTEST.—Protest is of very old origin, and the essential purpose of it is to furnish the evidence of a disinterested person that a negotiable instrument has been properly presented and dishonored.

403. MEANING OF PROTEST.—Protest is often used broadly to signify any dishonor of a negotiable instrument, but, of course, properly it means presentment by a notary, and his certification that an instrument has been presented for payment and dishonored. Protest is only necessary in regard to foreign bills. (Section 118.) A foreign bill is one which is drawn in one jurisdiction and payable in another. For this purpose the different States of the Union are foreign to each other. (Sec-

tion 129.) A bill drawn in New York payable in Boston is as much a foreign bill for this purpose as one drawn in England payable here.

WHAT MAY BE PROTESTED.—Though protest is not necessary for any other negotiable instrument, except foreign bills of exchange, including foreign checks, it is convenient frequently to protest other negotiable instruments. The law provides that protest may be made of other negotiable instruments (Section 118), and the certificate of protest is evidence in such cases, as well as in the case of foreign bills of exchange, of the facts which it states, namely, that the instrument has been duly presented and notice given. Statements in a certificate of protest, however, whether of foreign bills or of other instruments, are not conclusive evidence of the facts which they state. They are some evidence, but it may be shown by other evidence that the instrument was not presented, or was not presented at the time the certificate asserts, or that the notice was not given as therein asserted.

404. SECTION 153.—[PROTEST; HOW MADE.] The protest must be annexed to the bill, or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify:—(1) The time and place of presentment; (2) The fact that presentment was made and the manner thereof; (3) The cause or reason for protesting the bill; (4) The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

405. ESSENTIAL FACTS MUST BE PUT IN THE PROTEST.—As the purpose of protest is to furnish evidence of the necessary presentment, all facts which are necessary or useful for making out a case against parties secondarily liable, must be put in the protest.

406. SECTION 154.—[PROTEST; BY WHOM MADE.] Protest may be made by—(1) A notary public; or (2) By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

407. WHO MAY PROTEST PAPER.—A notary is of course the ordinary person to make a protest, although it is provided that protest may also be made by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. That would perhaps lead to inquiry as to what residents were respectable and what witnesses were credible, and it would be very foolish to take advantage of subsection 2 except in case of absolute necessity. Moreover as the preceding section requires, as the common law required, a seal to be attached to the protest, of which courts, even of another State, would take notice as proving that the paper was what it purported to be, it may be questioned whether the permission given in subsection 2 would be effective in case of a foreign (that is interstate) bill.

408. SECTION 155.—[PROTEST; WHEN TO BE MADE.] When a bill is protested, such

protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

409. TIME OF PROTEST.—The time of protest is the day of dishonor, unless delay in presentment is excused for reasons which we have previously spoken of. If a bill has been noted for protest, the protest may be subsequently written out as of the day protest was noted, but this must be done exactly. In one case a bill was noted for protest on the 24th of September. The extended protest was dated the 25th of September and contained a statement of the 25th of September as the day of noting. That protest was held invalid.

410. SECTION 156.—[PROTEST; WHERE MADE.] A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business, or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

411. PLACE OF PROTEST.—The place of protest is the place where the instrument is dishonored, and that, of course, is normally the place of payment. There is an exception to the rule that a bill must be protested in the place where it is dishonored, namely, when it is drawn payable at the place of business or residence of somebody other

than the drawee, and has been dishonored for non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable.

412. SECTION 157.—[PROTEST BOTH FOR NON-ACCEPTANCE AND NON-PAYMENT.] A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

413. COMMENT ON SECTION 157.—The statute also provides, in Section 150, that where a bill is dishonored for non-acceptance, the bill must be treated as dishonored or the holder will lose the right of recourse against the drawer and indorsers. That seems to mean that if a protest for non-acceptance is duly made, the indorsers and drawer are charged once for all. There is no occasion then for presentment for non-payment. Section 150 also seems to mean that if the instrument is dishonored for non-acceptance, and the holder fails to notify the parties secondarily liable, they are discharged, and in that case, also, there is no use to present for payment afterwards. The only cases, then, that we can think of in view of Section 150, where there could be any possible use in a second presentment. is (1) where the presentment for acceptance for some reason or other was not a proper presentment, and (2) where the place of payment is somewhere other than the residence or place of business of the drawee. Of course it may be desirable as a matter of business to make a second presentment to see if the drawee will not change his mind.

414. SECTION 158.—[PROTEST BEFORE MATURITY WHERE ACCEPTOR INSOLVENT.] Where the acceptor has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

415. COMMENT ON SECTION 158.—This follows the practice on the continent of Europe. I do not suppose it is very common in this country.

416. SECTION 159.—[WHEN PROTEST DISPENSED WITH.] Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

417. COMMENT ON SECTION 159.—Again we see that the test of the holder's duty in order to charge indorsers or drawers is diligence.

418. SECTION 160.—[PROTEST WHERE BILL IS LOST, ET CETERA.] When a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

419. COMMENT ON SECTION 160.—The law does not permit the rights of a holder of negotiable paper to be impaired by accidental loss or destruction even though the holder was guilty of

negligence. Therefore to protect the owner of such a bill in his rights against parties secondarily liable, he is allowed to make presentment personally, or (if strict protest by notary is necessary) by means of a copy or merely by a statement of the essential particulars of the instrument.

Article V—Acceptance for Honor

420. SECTION 161.—[WHEN BILL MAY BE ACCEPTED FOR HONOR.] Where a bill of exchange has been protested for dishonor by non-acceptance or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon, or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for the part only of the sum for which the bill is drawn and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party.

421. ACCEPTANCE AND PAYMENT FOR HONOR.—The statute contains rather elaborate provisions in regard to acceptance for honor and payment for honor of a bill of exchange. We suppose that is not of very common occurrence. The purpose of it is this: if we make ourselves liable for another person's debt, or if we pay another person's debt, it is not generally true that we have a right of recourse against him. We have no business to pay

another person's debts unless we want to free him from liability. But in the case of a bill of exchange which is dishonored, that is not true. An outsider may accept or pay for the honor of any party, generally the drawee, rendering himself liable, or making actual payment and still have recourse against the drawer. In order to get this recourse against the drawer it is necessary that the bill shall be presented to the drawee for payment and protested, so that the person who accepts or pays for honor has the certificate of the notary to show that he acted only after the drawee of the bill had refused to honor it. The statute is sufficiently self-explanatory of the general subject in Sections 161-177.

422. SECTION 162.—[ACCEPTANCE FOR HONOR; HOW MADE.] An acceptance for honor supra protest must be in writing, and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

423. SECTION 163.—[WHEN DEEMED TO BE AN ACCEPTANCE FOR HONOR OF THE DRAWER.] Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer.

424. SECTION 164.—[LIABILITY OF THE ACCEPTOR FOR HONOR.] The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

425. SECTION 165.—[AGREEMENT OF ACCEPTOR FOR HONOR.] The acceptor for

honor, by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also, that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given him.

426. SECTION 166.—[MATURITY OF BILL PAYABLE AFTER SIGHT; ACCEPTED FOR HONOR.] Where a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

427. SECTION 167.—[PROTEST OF BILL ACCEPTED FOR HONOR, ET CETERA.] Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

428. SECTION 168.—[PRESENTMENT FOR PAYMENT TO ACCEPTOR FOR HONOR; HOW MADE.] Presentment for payment to the acceptor for honor must be made as follows:—(1) If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity. (2) If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section one hundred and four.

429. SECTION 169.—[WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.] The provisions of section eighty-one apply where

there is delay in making presentment to the acceptor for honor or referee in case of need.

430. SECTION 170.—[DISHONOR OF BILL BY ACCEPTOR FOR HONOR.] When the bill is dishonored by the acceptor for honor it must be protested for nonpayment by him.

Article VI—Payment for Honor

431. SECTION 171.—[WHO MAY MAKE PAYMENT FOR HONOR.] Where a bill has been protested for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

432. SECTION 172.—[PAYMENT FOR HONOR; HOW MADE.] The payment for honor supra protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

433. SECTION 173.—[DECLARATION BEFORE PAYMENT FOR HONOR.] The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

434. SECTION 174.—[PREFERENCE OF PARTIES OFFERING TO PAY FOR HONOR.] Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

435. SECTION 175.—[EFFECT ON SUBSE-

QUENT PARTIES WHERE BILL IS PAID FOR HONOR.] Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

436. SECTION 176.—[WHERE HOLDER REFUSES TO RECEIVE PAYMENT SUPRA PROTEST.] Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

437. SECTION 177.—[RIGHTS OF PAYER FOR HONOR.] The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Article VII—Bills in a Set

438. SECTION 178.—[BILLS IN SETS CONSTITUTE ONE BILL.] Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitutes one bill.

439. BILLS IN A SET.—Another rather exceptional sort of case relates to bills in a set, and this is provided for in Sections 178 to 183. We call the case exceptional, but, of course, it is common enough in foreign exchange. The reason is not apparent why the practice still persists of drawing

such bills in a set, each part of which is an original. We do not know why one original and copies would not serve every useful purpose; but however this may be, it is common to draw foreign bills in a set, and each part is as much an original as the others. Whichever one is indorsed first gives to the indorser a perfect title to the whole. If the holder of a bill in three parts should indorse the three parts, the first part to A, then the second to B, and then the third to C, A becomes the owner of the whole bill; he can demand the other parts from B and C. It would not matter if the first indorsed part were numbered the third in the set; A would still be the first man to get an indorsement, and he therefore would become owner of the whole set. In spite of the fact that A is the owner of the whole, if B or C should present his part to the drawee, and the drawee in good faith accepted or paid the part first presented to him, the payment would be a discharge of the bill; but we suppose A, who was the first indorsee, would have a right against the later indorsees B or C, who got payment from the drawee. A could say to B or C: "That money which you got really belongs to me, for I was the owner of the bill." Of course, if the holder should do as we have suggested—indorse for value the three parts to different persons—he is committing a fraud. He is liable on his indorsement on every part to whomever may have paid value for that part. The ac-

ceptance may be written on any part, but it must be written on only one part. If it is written on more, the acceptor would be liable to a holder of each part on which he had written an acceptance. That is a very sensible provision, and yet we can see no more reason for requiring that acceptance be written on one part only than for requiring that the drawer's name be on one part only. Of course, that is merely saying again, the practice of drawing bills in sets is unfortunate. The acceptor cannot properly make payment on any part except the one on which his acceptance is written; that is, he must get that part surrendered to him or he will not be discharged.

440. SECTION 179.—[RIGHTS OF HOLDERS WHERE DIFFERENT PARTS ARE NEGOTIATED.] Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

441. SECTION 180.—[LIABILITY OF HOLDER WHO INDORSES TWO OR MORE PARTS OF A SET TO DIFFERENT PERSONS.] Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

442. SECTION 181.—[ACCEPTANCE OF BILLS DRAWN IN SETS.] The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

443. SECTION 182.—[PAYMENT BY ACCEPTOR OF BILLS DRAWN IN SETS.] When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

444. SECTION 183.—[EFFECT OF DISCHARGING ONE OF A SET.] Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise the whole bill is discharged.

CHAPTER IV

Title III of the Negotiable Instruments Law

PROMISSORY NOTES AND CHECKS

Article I

445. SECTION 184.—[PROMISSORY NOTE DEFINED.] A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another signed by the maker engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

446. COMMENT ON SECTION 184.—The requirements of this section have been considered in detail at the beginning of the Act.

447. SECTION 185.—[CHECK DEFINED.] A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check.

448. LIABILITY OF DRAWER OF A CHECK.—As a check is payable on demand it does not contemplate acceptance, though certification of the check corresponds to acceptance and imposes the liability of an acceptor on the certifying bank. There are three differences of special importance

between the obligation of the drawer of a check and the obligation of the drawer of any other kind of demand bill. In the first place, giving a check is a representation by the drawer that he has funds. If we draw a bill of exchange, which is not a check, on some one and give it to a person who pays value for it, we are not guilty of false representations merely because we have no right to draw on the drawee and he refuses to pay the draft and is under no duty to pay it. We are liable for breach of promise on our signature as drawer, that is all; but one who draws a check and passes it represents that he has funds in the bank and accordingly he is guilty of fraud and misrepresentation, and is not simply breaking a promise if the check is not paid for lack of funds. The other two differences are considered under Sections 186 and 188.

449. SECTION 186.—[WITHIN WHAT TIME A CHECK MUST BE PRESENTED.] A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

NOTE.—In the Illinois and South Dakota Acts there is inserted after the word "issue" "and notice of dishonor given to the drawer as provided for in the case of bills of exchange."

450. INSUFFICIENT DILIGENCE DOES NOT ALWAYS DISCHARGE THE DRAWER OF A CHECK.—The second difference between checks and ordinary bills of exchange relates to the

effect of using insufficient diligence to charge the drawer. In order to charge the drawer of a bill the instrument must be presented at maturity if it is a demand bill; and on being so presented notice must be given promptly to the drawer if the instrument is dishonored. If such presentment is not made or such notice is not given the drawer of a bill is absolutely discharged. But Section 186 provides that a check must be presented for payment within a reasonable time after its issue (that is, like any bill) or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. Those last words lay down an entirely different rule from that applicable in case of a bill of exchange which is not a check. The drawer of such a bill of exchange would be absolutely discharged. The drawer of a check is not discharged except to the extent of the loss caused by the delay, and usually, unless the drawee bank fails, there will be no loss caused by the delay. This section of the Negotiable Instruments Law says nothing about what would be the effect of a failure to give prompt notice to the drawer in case a check was dishonored. As the statute does say (Section 185) that the rule as to checks is the same as the rule governing bills of exchange in all matters not specifically stated, the effect of the statute seems to be that though delay in presenting a check discharges the drawer only to the extent he was injured, delay in notifying the

drawer of the dishonor of the check absolutely discharges him, just as it does the drawer of an ordinary bill of exchange. Probably this is a blunder in the Negotiable Instruments Law. The law before the statute was that delay in giving notice of dishonor was no more serious than delay in making presentment in the case of checks.

451. SECTION 187.—[CERTIFICATION OF CHECK; EFFECT OF.] Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

452. COMMENT ON SECTION 187.—This section must be taken subject to the qualification in the following section.

453. SECTION 188.—[EFFECT WHERE THE HOLDER OF CHECK PROCURES IT TO BE CERTIFIED.] Where the holder of a check procures it to be accepted or certified the drawer and all indorsers are discharged from liability thereon.

454. EFFECT OF CERTIFICATION OF A CHECK ON THE DRAWER'S LIABILITY.—The third difference between the drawer of a check and the drawer of an ordinary bill of exchange is stated in this section. Certification of a check corresponds in the main to an acceptance of the bill, as has been said, but if the acceptor of an ordinary bill fails to pay at maturity, the holder can notify the drawer and charge him. In the case of certification of a check, however, a distinction is taken. If the certification is obtained by the drawer of the check

before delivery to the payee, the situation is just the same as in the case of an accepted bill of exchange. The holder, if he does not get his money from the certifying bank, can sue the drawer of the check; but if the holder of a check himself gets it certified he thereby discharges the drawer. The reason for the distinction is this: a check is an instrument payable on demand, and the normal thing for the holder of a check to do is to get his money. If he goes to a bank and asks for a certification he is not doing the normal thing, and it would not be fair to allow him to extend the liability of the drawer by keeping the check outstanding when he might have got his money instead of the certification when he presented the check. With the exception of those three differences the liability of the drawer of a check is the same as that of a drawer of a bill.

455. SECTION 189.—[WHEN CHECK OPERATES AS AN ASSIGNMENT.] A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

456. A CHECK IS NOT AN ASSIGNMENT OF PART OF THE ACCOUNT ON WHICH IT IS DRAWN.—Before the enactment of the Negotiable Instruments Law, there was, in a number though not in most of the States, another important difference between a check and other bills of exchange. It was the law of this minority of the

States that a check made the payee or holder the assignee of a sufficient portion of the drawer's account to pay the check, though an ordinary bill of exchange did not have this effect. Under this rule the bank on being notified of the check was liable directly to the holder to pay it, if the drawer's account was sufficient to meet it. The holder of the check as soon as he acquired it was regarded as becoming owner of so much of the drawer's account as equalled the face of the check. This rule does not exist now in any State which has adopted the Negotiable Instruments Law, for by Section 189 of that statute, it is provided that a check does not operate as an assignment; and the statute also in Section 127 enacts the rule prevailing generally at Common Law that a bill of exchange too does not operate as an assignment.

457. A CHECK IS NOT AN ASSIGNMENT EVEN WHEN CERTIFIED.—The last clause of this section is somewhat misleading since it implies that after acceptance or certification, the check does operate as an assignment. The words of the section itself are not perfectly clear. They may mean only that the bank is not liable unless and until it accepts and certifies, which is certainly true, but they may imply also that a check operates as an assignment when the bank certifies. If the comma after the word holder were omitted, the former meaning would clearly be the right one; but in view of the heading of the section

it is probable that the latter meaning was intended. Nevertheless, the holder of a certified check is not an assignee. He has a direct right against the bank. If he were an assignee his claim would be subject to any defense which was good against the drawer.

458. SECTION 190.—[SHORT TITLE.] This section shows how act may be cited.

459. SECTION 191.—[DEFINITIONS AND MEANING OF TERMS.] This section defines "Acceptance," "Action," "Bank," "Bearer," "Bill," "Delivery," "Holder," "Indorsement," "Instrument," "Issue," "Person," "Value" and "Written."

460. SECTION 192.—[PERSON PRIMARILY LIABLE ON INSTRUMENT.] Defines persons "primarily" and "secondarily" liable.

461. SECTION 193.—[REASONABLE TIME, WHAT CONSTITUTES.] Section defines a "reasonable time" and an "unreasonable time."

462. SECTION 194.—[TIME, HOW COMPUTED.] Explains the rule regarding Sundays and holidays.

463. SECTION 195.—[APPLICATION OF ACT.] Act is not retroactive.

464. SECTION 196.—[CASES NOT PROVIDED FOR IN ACT.] Law merchant governs cases not provided for in this act.

465. SECTION 197.—[REPEALS.] Repeals all acts inconsistent with this act.

466. SECTION 198.—Provides when act takes effect.

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